

THE ANATOMY OF A TORTS CLASS*

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INTRODUCTION

It is the afternoon before my final torts class. I am sitting in the computer room trying to get the adrenaline ready and pretending to myself that I am not nervous. This is the first time I have ever taught torts and even though the semester is almost over I can still feel the mixture of longing and dread that goes with a first time preparation. I have thought about this class all semester. I have worried obsessively, celebrated when things went right, wept when they went wrong, prepared new materials, tried to apply the things I know about legal theory, borrowed ideas from my friends, psychoanalyzed the class and myself. But during this period, starting eight months ago when I first learned I was to teach the course, one thing has been nagging at me—nobody writes about teaching.

Of course, there is writing about teaching—people have written about the immorality of the no-hassle pass, the need to find alternatives to the Socratic method, and the proper techniques for educating students in the mysteries of negotiating and counselling.¹ But almost nobody writes about the peculiar fusion of abstract theoretical aims (“I want to teach them to take apart economic arguments”) and concrete classroom experiences (“the guy in the red sweater is getting angry with this line of thought”) that makes teaching such a

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This Article was written in one class about another. Without the people in our modern legal theory class, I never would have developed the chutzpah to actually try to write a phenomenology of the classroom instead of just talking about one. Without the people in the torts class, this would be an anatomy of a cadaver rather than something a little more lively. Without Duncan Kennedy's inspiration the Article would not exist at all. Without Peter Jaszi and Jim May, I would have made even more mistakes; and without Peter, I wouldn't have got the stories about William James and the giant turtles. I would like to thank everyone. The Article, however, is dedicated to the turtles.

1. See generally G. BELLOW & B. MOULTON, *THE LAWERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

fascinating and frightening job.² Of course, one could argue that this is actually a good thing. When we write articles, we are supposed to deal with the universal and public (legal theory), not the particular and private (first year angst). But this idea of what scholarship is all about is both mistaken and pernicious. It is mistaken because, as we should all realize in this relativist age, there is nothing out there in the world that comes to us as a ready-marked "topic for scholarly investigation." We have to choose what to write about and in that choice the decisions made by past scholars are not the final word. This point seems unobjectionable, trivial even, but I believe that it is not and this is where the perniciousness comes in.

Most people seem to believe that legal scholarship is ailing, if not actually decomposing. Among the most frequent criticisms are that it is poorly written, overedited, trivial in subject matter, impenetrable in style, of little practical or theoretical importance, and that it fails to confront the important issues of subjectivity and objectivity that have fueled most intellectual debates since the beginning of the century. In any event, all is not well.

I happen to believe that there are explanations for all of this, but for the moment let us concentrate on temporary solutions. To me it seems that one of the main problems with legal scholarship is that, driven by Langdellian dreams of glory, it tries to exclude all of the contexts, the existential experiences, and the political and emotional conflicts that would make it memorable, interesting or useful.³ If "areas of study" do not come to us ready-labelled as such, why is it that we choose to exclude from our scholarly discourse the very arena in which that scholarship will supposedly bear fruit—the classroom? But I promised to offer solutions rather than questions, so let us proceed.

The first thing that I discovered as a teacher was that, not only did abstract rules fail to decide concrete cases, abstract knowledge failed to provide good teaching. When I say "abstract" I do not mean cosmic philosophy; I mean knowledge that was not fleshed out by all the examples, hypotheticals, phenomenologies, and other little stories that are actually the most important part of the act of communal mind reading that we call legal education. But my complaint is not

2. For important exceptions, see D. KENNEDY, *supra* note 1, at 1-13; Elkins, *Rites de Passage: Law Students "Telling Their Lives,"* 35 J. OF LEGAL EDUC. 27, 27-30 (1985); Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching,* 33 U. TORONTO L.J. 279 (1983).

3. For background, see R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's* (1983); Chase, *The Birth of the Modern Law School,* 23 AM. J. OF LEGAL HIST. 329 (1979); Chase, *Book Review,* 67 MINN. L. REV. 844, 844 (1979) (reviewing W. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982)).

simply that the law teacher's language of power failed to act as a good teaching manual for me; it is that it excluded all of the aspirations, disappointments, hierarchies, and power plays that make up the "experienced reality" of every class. I came to believe that, not only is this exclusion unjustifiable, it is actually politically slanted—it denies us access to the time and place in which most of the implicit messages about professional culture, legal ideology, and technical skills are really being transmitted.

Now, if there is one issue on which there is general consensus among law teachers, it is that legal education is even sicker than legal scholarship. First year angst, second and third year burnout, not enough theory, not enough practical skills—these themes come up again and again.⁴ But since we do not *write* about what we do in class, we insulate ourselves from comment and criticism in a way that inevitably tends to reinforce the apparent inevitability of the status quo. There are exceptions, some of them notable. But, by and large, we hide the form, content, political slant, and emotional effect of legal education behind the impenetrable walls of the "private sphere." In this Article I want to explore the consequences of this exclusion by telling the story of one torts course and seeing what happens. I will explain some of the things I tried to teach my students, reproduce the handouts I gave them on particular issues, and intersperse this technical, "public" reality with the dense, "private" reality of hopes and fears that actually constituted the "feel" of the class.

I had been teaching for two years before I taught a first year, doctrinal class. I had taught jurisprudence, legal profession, and various aspects of international law, but had never covered the juggernauts of the legal curriculum: contracts, torts, and property. The first thing that occurred to me was that this would be a wonderful opportunity to demystify the subjects that seemed to cause such psychic anguish to first year students and that set the stage for the disenchantment, apathy and boredom of the second and third years. I had become convinced that there was a profound malaise in the first year and that, by packing first year courses with a mixed bag of indispensable, argumentative tools and schizophrenic and disempowering images of what was *really* going on, we had reproduced this malaise in generation after generation of law students. I had tried to find out more about this idea from the jurisprudence class that I taught in my first year as a law professor.

4. At times the pages of the Journal of Legal Education read like a Brechtian lament. Those who are interested might try scanning recent issues.

My students told me that it was not that they did not get *any* history in their doctrinal courses, it was that they got the wrong kind of history—a hearty tale in which “old bad” things are perpetually giving way to “modern humane” things—the deep logic of history is on the move and, lucky us, it is coming our way. Giving this kind of role to history might seem to devalue human activity, but not a bit of it; there is still an appropriate (if limited) role to play for we happy moderns. It is umm . . . well, “reform” mostly.

So much for history. What about theory? The same students told me that it was not that they did not get *any* theory, it was that they got the wrong *kind* of theory. One woman described her experience of legal theory by telling me about *her* torts class. She had reacted with outrage during a discussion of whether it was economically efficient to save the lives of fifty children every year by putting seat belts in school buses. Thinking of her own eight-year-old daughter, she had, in her own words, “just radiated raw emotion at the class.” The professor had not put her down—not exactly—he had told her that her “value feelings” were important in their place, but that their place was outside the classroom or the courtroom. She wanted me to tell her whether this was an *accurate* theoretical portrait of the acceptable and useful discourse of lawyers. Was her remark really “inadmissible”? It is from these ideas about doctrine, theory, history, and exclusion that I drew my conception of the course.

I. WHAT I THOUGHT I WAS DOING IN THE COURSE AND WHY

As I come to describe my aims when I started teaching torts, I find myself inhibited by the same tacit ban against writing about the classroom that I mentioned earlier. Somehow it seems that I am unworthy to lay my text before you unless it contains the description of some “Unified Field Theory of Tort Teaching.” If it needs saying that I don’t have or want such a thing, then consider it said. Nor can I even depend on the *frisson* of being a sort of Havelock Ellis of private law—allowing the first, forbidden glances inside the classroom, just as Ellis took us inside the bedroom.⁵ All that I would claim is that this kind of writing seems to be connected in an interesting way to both the workplace experience of teachers and the ideological effect of “legal theory” as it is actually presented to aspiring lawyers. And by combining these two kinds of phenomenological analyses, I think that we can begin to understand the energy-sapping confusion

5. See H. ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* (1942); H. ELLIS, *THE PSYCHOLOGY OF SEX: A MANUAL FOR STUDENTS* (1933).

of first year law school as well as the internal ideology of the legal profession.

In this section I have not tried to describe everything that I tried to do in the classroom. Rather, I have attempted to explain the projects that seem to me to have been the most important, or the hardest to accomplish. I will start by sketching out a caricatured version of the standard torts course that I can use either to react against, or to complement my own ideas. I will then describe the overall strategy of the course that I taught and explain the use that I made of the materials that are included in the appendix to this Article. The remainder of the Article consists of a set of stories about how these abstract theoretical aims were translated into the concrete reality of two hour class periods.

II. THE STANDARD STORIES OF A TORTS COURSE

As far as I can tell, most tort courses tend to revolve around a limited number of stories or plots. Some of these stories are particular to tort law, others apply more generally. When summarized, these stories lose a great deal of the impressiveness and authority that they would have if they had been presented in a course. Part of the appeal, after all, consists of carefully picking the story out of the mass of confusing and contradictory material contained in the casebook. By omitting all this arcane detail, I may seem to trivialize the messages that the stories convey. That is not my intention, but on the other hand it does not seem like a bad idea.

A. *First Story: Rules vs. Mush*

The first plot permeates the whole of legal education. Law students experience it most powerfully in the first term of the first year. This plot is based on a basic contradiction. On the one hand, law is presented as a set of rules that lawyers learn to apply to concrete situations with the aid of technical methods of reasoning. The lawyer who has mastered this process is marked above all by her *knowledge* of this settled body of rules. On the other hand, law is seen as totally manipulable, a grab bag of arguments, sources, and examples of flip-flop rhetoric. The lawyer is not seen as *knowing* a settled body of rules, but rather as being adept in the *manipulation* of all of this mush. The second picture of law is probably the predominant one in *statements* about what is being taught (although this may depend very much on what kind of law school you go to) and it is the one that teachers tend to identify themselves with. If you wander the hallways outside the faculty offices, you are almost bound to hear some

professor complaining about the students who are always clamoring for "the rule on the subject." The undertone of the complaint is a very seductive one—the professors are bonded together by their knowledge that everything is in flux *and* by the fact that the students are excluded from this knowledge because students have a greater "psychological need for certainty." Or so the story goes.

The students have a harder time putting together a story about what is going on. They experience the whole process of legal education as confusing, frustrating, and groundless. There is almost a feeling of weightlessness about it; you never know whether you are writing down the right thing. The flashes of terror generated by the Socratic method do not seem to be justified by the amount of information that it produces and you begin to wonder when you are going to be able to get to something *real*—some rules, some political analysis of the rule structure, some philosophy, economics, history—*anything* that would make some sense out of these thousands of pages of judicial rhetoric. The occasional demands for "rules" are only emblematic of this general sense of "groundlessness." Those who voice early fears about the bar exam are often merely trying to transfer their general unease to a reasonably concrete event—a strategy which promises to make the anxiety easier to deal with by making it more specific, but which actually does the reverse because it obscures the real causes of what is going on.

Things are further confused if we look at the messages teachers actually give students about the determinacy of law: messages that often seem very different from the complaints that "my 'kids' just want the rule." Students do not believe professors when they claim that "I teach that everything is policy." Partly this is because they perceive, quite rightly, that some "correct" method is being taught—some people get praise in class, others "are missing the point." If these "points" are not coming from rules, where are they coming from? From "thinking like a lawyer" says the teacher, which does appear to be begging the question ever-so-slightly. What is more, the teacher does give the impression that there are "right answers" to cases—not on moral or political grounds, or even in terms of some clear piece of rule interpretation—but because some clever argument makes the judge sound silly. "This ruling will open the floodgates of litigation." The trouble is that, in the next case, you find yourself nodding in agreement as the teacher brushes the same argument aside, when a student makes it, because it "only deals with *desirability* and what we are dealing with here is the *validity* of the rule."

So the first story that comes out of legal education is generated by the tension between law-as-neutral/objective-logical-rules and law-as-manipulable-inescapably-political-mush. Many different groups of people tell this story in many different accents, but the plot is always recognizable. As I will explain later, one of my primary aims in teaching the course was to deal with this tension in a way that avoided the boring apologetics of those who spoon-feed the rules under the pretense that they are coherent, but that also avoided the "new formalism," which is smuggled in by the devotees of "balancing tests" and law and economics.

B. Second Story: The Logic of History

I mentioned earlier on that the caricatured form of legal history available in most classes makes it seem as though the "old, bad law" is giving way to the "modern, enlightened law."⁶ This story appears in almost all of the first year subjects. In contracts this general historicism takes the form of a story about how we have moved away from the old, bad rigidity of a formalistic "Will theory of Contracts" towards the new, humane flexibility of the doctrine of reliance. In torts the plot is even clearer⁷—history is moving us from an ethical definition of negligence to a cost-benefit definition, from negligence to strict liability, from contributory to comparative negligence, from the fellow-servant doctrine to workers' compensation, from "objective causation" to proximate causation and from privity and *Winterbottom v. Wright*,⁸ to foreseeability and *McPherson v. Buick*.⁹ The meaning of these historical changes is another question. The version that I have found to be most prevalent does not attribute an *overt* meaning to them at all. Instead, this pattern just seems to emerge of its accord and it is rendered all the more attractive because of the problem I mentioned in the first story line; the feeling of panic and

6. See Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018-24 (1981).

7. In the original draft I had apologies and qualifiers in every sentence. Let one disclaimer cover all. I am trying to get at the way people actually experience teaching or learning a first year subject. This is something that seemed important to do. The method I finally turned to was making flat assertions. If none of my descriptions rings a bell, then these assertions are simply wrong. The dearth of references to the tort literature should also alert you to the fact that this Article does not propose any radical insights into tort theory. Instead, I was trying to find a "voice" or a "tone" in which to express both the confused goals of the first time teacher and the experience of trying to achieve those goals in class. Consequently, the Article swings wildly between grand design and modest, particular detail. It was in trying to edit out these swings that I came to realize how integral a part of the experience of teaching they actually were for me. In turn, this realization made me decide to leave them in.

8. 152 Eng. Rep. 402 (Ex. 1842), reprinted in R. EPSTEIN, C. GREGORY, & H. KALVEN, JR., *CASES AND MATERIALS ON TORTS* 413-15 (1984) (casebook used in class) [hereinafter cited as R. EPSTEIN].

9. 217 N.Y. 382, 111 N.E. 1050 (1916), reprinted in R. EPSTEIN, *supra* note 8, at 417-24.

groundlessness as students are whipsawed between the claim that everything is rules and the claim that everything is mush.¹⁰

Given this set of panicked background feelings, people will clutch at *any* kind of pattern at all. Better still, the teacher may give a little extra coherence to the whole edifice by mentioning in an occasional (and nonlegal) aside that these changes "represent the necessary reforms to the laissez-faire market system," or that they have "gone too far." It is clear, however, that these asides do *not* represent what it is "to think like a lawyer" and the person who tries to argue for workers' compensation as a way of ending class violence through the legal system is much less likely to get the teacher's plaudits than the person who has learned the cooler rhetoric of administrative efficiency, or who can manipulate the legal fictions surrounding the master-servant relationship. Generally, law teachers give no explanation as to how these latter arguments attained their authoritative, correct *legal* status—and if you cannot explain to yourself why one set of political arguments turned out to be "wrong," while another set turned out to be "right," then at least you have the tentative satisfaction of beginning to recognize these "legal" arguments and maybe even use them yourself. In six months you will not remember how they could ever have seemed so strange—a fact that will make it twice as hard to apply the moral and political ideas that you came to law school with because they will not seem as *authoritative* as these new ones you have learned. Try expressing your most profound utopian ideas in the language of administrative efficiency, rule interpretation, or stability of expectations. They sound ludicrous, don't they? But remember that the teacher never told you that your ideas were *wrong*, just that they were not "the right stuff." Who can argue with that, particularly when they are trying to brief twenty cases a night? It seems best to just rely on the tide of history to express your ideas about the desirability of change. After all, if there is one message you have picked up, it is that history is moving in the right direction by itself—there is probably no need to give it a hand anyway.

So far we have met two of the major plots: first, the contradiction between objective rules and manipulable mush and, second, the Polyantha historicism that makes it seem as though, for the last one thousand years, the common law has been working towards a kind of souped-up Kennedy liberalism. You may have noticed that in both of these stories all of the interesting stuff is left outside the

10. For the most stylish mix of these ingredients, see the ubiquitous Prosser & W. Keeton, *PROSSER AND KEETON ON THE LAW OF TORTS* (5th ed. 1984).

main narrative, and thus outside the classroom. You may oscillate between thinking that you are learning rules and thinking that everything is policy, but the oscillation is not linked to any kind of political explanation of why it seems important that the law be neutral in the first place. And as for history, since the common law seems to be working itself pure (*i.e.* toward the center-right of the Democratic party), there is little in-class time devoted to the question of who actually made these changes happen. This is the real way that law teachers present law as being separate from politics. It isn't that a teacher will never say "it's all policy." It's that all of the law school learning feels as though it exists in a vacuum, unconnected to social history, utopian visions, or your own picture of yourself and of your own politics—unconnected even to anything you learned in college. Trying to get a grasp on this without betraying either your political ideals or your sense of self-identity feels about as easy as rock climbing up a plate glass window. This is why the last standard story, law and economics, is so attractive.

C. *Third Story: Law and Economics*

The law and economics story not only puts a twist in the potted history, but also appears to offer a *solution* to the awful mushiness of the whole edifice. Even better, tort law seems to be very hospitable to the logic of economics. The first page of Posner's casebook triumphantly exhibits the Learned Hand formula, showing that cost-benefit analysis is not only "scientific," but also based on precedent.¹¹ Apart from the support of famous dead judges, there is the appealing claim that, unlike contract law where the legal relationships supposedly flow from a series of *pre-existing* market decisions made by the parties, tort law must be based on a set of *after-the-fact* judicial approximations of what the market would have done. This sounds all right in the abstract, and by the time that one gets to the details one is risking a lot—who would want to give up this newly found (and oh-so-appealing) certainty just because of a few niggly problems.

The substance of the law and economics plot line is more complicated—Franz Kafka and Thomas Pynchon rather than Ian Fleming or Beatrix Potter. One standard way of presenting it is to start with the difficulty of defining any of tort law's operative concepts. In all but the most formalistic of classes, the students learn early on that legal definitions alone are useless, without some idea of the back-

11. R. POSNER, *TORT LAW: AN ECONOMIC APPROACH* (1980).

ground purpose of the concept. This means that they are already trying to walk along an unsteady line between formalistic Gilbert recital and some other kind of analysis that will save the legal definitions from circularity by linking them to something outside of the legal world, but not so far outside that it will be ruled out of order as "having nothing to do with the legal system."

"Negligence," for example, is initially seen as a purely *legal* term, the meaning of which can be understood merely by looking to the magic set of words contained in the hornbook. This allows the teacher to demonstrate (with varying degrees of sadism) the emptiness of any purely verbal formulation of a concept. Next, the students will be encouraged to show that negligence is based on some set of moral or ethical judgments. The resulting morality will then be used to explain the patterns of results in the same cases that had proved so resistant to analysis when the class had been applying the verbal formula out of the hornbook. Some classes simply stop here, leaving the students with a weird mishmash that generally consists of two kinds of morality (rights thinking and utilitarianism)—a very truncated and pragmatist vision of language and a lot of arguments about administrative efficiency.

But some classes do *not* stop here. The law and economics teacher can keep going—showing the class that even the revamped legal concepts are indeterminate. No matter how long the analysis goes on, or how many different policy factors are weighed, there will always be a need to choose between two contradictory rights, or two conflicting policy interests, or two different conceptions of public welfare—a need to sacrifice one person's interest in security to another's interest in freedom of action. It appears that there is no neutral calculus that can decide whose ox is gored, no means of deducing an apolitical solution to the problem. This is where economics comes in. By appearing to provide nonideological answers to these kind of questions, a law and economics approach seems to offer the hope of dissolving not only the conflict between rules and mush, but also the student's feelings of incompetence and powerlessness. Look at the definition of negligence. Instead of offering an equivocal answer that brings in general ethical standards in the community, legitimate expectations and rights of security, the economic approach has a little equation with three variables: $B < PL$.¹² What more could one want? I am not going to describe the

12. The actual language of Hand's formulation is so innocuous that it is hard to believe it represents such a potential threat to rights-based theories of liability.

[One's] duty . . . to provide against resulting injuries is a function of three variables:

law and economics approach any further here. I will do that later when I can use specific examples of economic analysis. Instead, I want to leave the standard stories behind and go on to talk about the things that I thought I was doing in the course and why I was doing them.

III. THE GOALS OF THE COURSE

For a long time before I taught this torts course, I had been mouthing off about the evils of first year. My theory had always been that the method of legal instruction actually heightened the confusion between rules and mush. Law teachers taught students a large number of argumentative and rhetorically manipulative devices and they taught all this within the framework of the "rule of law"—but how can we have a government of "laws and not men" if you can manipulate any of the rules any way you want? When I came to teach torts, I had to stop mouthing off and instead decide how I was going to deal with this problem in class. So my first goal was to teach all of the argumentative skills as quickly as possible and to do this without making the process either mystifying or politically deadening.

My second goal was to improve the legal history side of the course. I wanted to get rid of the silly historicism that appeared to provide the normal fare of first year classes. I planned to replace it with an historical analysis that would show the students that these patterns of doctrinal changes do not simply "happen." They are the result of risks run and actions taken by real people—people who often do not appear in the casebook. At the same time, I did not want to turn the course into a bad example of instrumental history—the kind of course where everyone talks as though all the judges and the plutocrats got together every night to decide where the common law was going the next day. So my goal was to bring out the importance of patterns of ideas and clusters of belief (including legal ideas and beliefs) in making the world seem to be simultaneously "natural, inevitable, and just."

The second standard story did a little of this, but in a profoundly perverted way, making it appear as though "legal consciousness" had only exercised an ideological effect in the bad old days of for-

(1) The probability that she [the vessel] will break away; (2) The gravity of the resulting injury, if she does; (3) The burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P ; the injury L ; and the burden B ; liability depends upon whether B is less than L multiplied by P : i.e., whether $B < PL$.

United States v. Carroll Towing Co., Inc., 159 F.2d 169, 173 (2d Cir. 1947).

malism, privity limitations, and the fellow-servant rule. I decided to focus on the same historical set of changes so beloved of the standard story—the move from the laissez-faire, atomistic, formalist, rights vision of law that dominated the second half of the nineteenth century to an interventionist, “social welfare,” legal realist, instrumental vision by the end of the first half of the twentieth. Apart from the goals I have mentioned so far, I thought that this focus would allow me to do three other things that seemed to be important; (a) to explain legal thought as, in part, made up of “paradigms,” each containing the seeds of a number of contradictory visions of “the good life”; (b) to expose the students to the devastating and liberating effects of contingency. These effects normally come in two waves. First, the feeling of ridicule as you look on the cultural artifacts (or paradigms of legal thought) of another time and find them to be transparently artificial justifications for the status quo, despite the fact that the language in which they are couched presents them as the very epitome of naturalness or neutrality. Second, the feeling of panic and enlightenment as you suddenly realize that the same thing could be said of your own mental and social constructs;¹³ and (c) to continue the process of training in argumentative skills by explaining the amazingly sophisticated methods of deconstructive analysis that were developed by the legal realists and to work out some of the implications that these methods have for mainstream liberal politics.

My third goal concerned the set of objectives that are generally referred to in the dry terminology of the Association of American Law Schools as “the humanization of legal education.” I wanted to make the classroom less hierarchical, less stereotypically “male,” less alienating, and less boring. That meant giving up the seductive mantle of infallibility that first year students confer on their teachers, no matter how demonstrably rude, inept, and narrow those teachers might be. It meant accepting the fact that this refusal to be a patriarchal source of authority will be resented, implicitly by one’s students and explicitly by one’s colleagues (or is it the other way around?). It meant doing without the perverted adrenaline rush of the authoritarian-Socratic classroom, where the frequent tension-dispelling bursts of laughter both belie and demonstrate the degree to which the energy in the classroom is driven by fear. This is the same fear which will soon turn to the pervasive boredom and burn

13. See generally Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Boyle, *Modernist Social Theory: Roberto Unger's Passion* (Book Review), 98 HARV. L. REV. 1066 (1985).

out of the second and third years, in the same way that the first *rush* of a speed trip soon turns to cranky and introverted paranoia. It meant doing something about the Gormenghast architecture of my own insecurities, ranging from the familiar "my students will ridicule me and my colleagues will revile (and then fire) me" to the more baroque variations on life, death, and professional power. This, above all, was the part of the class that caused the manic swings—the Fred Astaire highs and the Sylvia Plath lows—and that convinced me that, in a nontrivial and profoundly interesting sense, the personal is the political.

IV. THE DESIGN OF THE COURSE

The torts course was split into three sections. Lots of things were supposed to happen in each section and they were supposed to happen in a way that made them both interesting and easy to learn. Needless to say, that was not the way that it happened.

In the first section I concentrated on arguments. Duncan Kennedy had been kind enough to send me his tort materials and I was very excited by the way that he had developed categories of matched pro and con standard arguments. If I was right in my diagnosis of the faults of first year, then the wild swings from confusion to exhilaration, from "mastery" to paralysis and insecurity, were partly caused by the failure to tell students that a lot of the time we were teaching them a standard rhetoric and *not* a set of rules or a body of knowledge at all. If this was part of "thinking like a lawyer," what would happen when you demystified the process and taught the arguments explicitly and overtly? Whatever happened, it would surely be better than expecting the students to pick up these arguments by osmosis while they are still under the illusion that there are *right answers* and that, correctly understood, these arguments will deliver them. If you turn to the Appendix at the end of this Article, you will find the handout in which I explained (and gave examples of) these standard arguments.¹⁴ But this is only part of the story and it is not the most important part. It is inside the classroom that the really interesting stuff happened.

I decided to start in the same way as the standard torts course—by covering intentional torts. "Everyone understands a punch in the mouth," or, at least, they *think* they do until the teacher undermines even this apparently simple category of wrongs. We were going to spend three weeks on intentional torts, including intentional inflic-

14. See Appendix. The focus on arguments was suggested by Duncan Kennedy who allowed me to use both his expertise and his teaching materials.

tion of emotional distress, and I was going to spend most of that time talking about arguments. This is what it was like.

V. FIRST WEEKS

There are few things more frightening than walking up to the podium on the first day of a class you have never taught before. The adrenaline comes in waves. You are unsure what expression is on your face, but you are sure it is a stupid one. You keep getting these sickening jolts in the pit of your stomach—like the feeling when you are at an airport and think that you have lost your passport. In addition to these, the usual joys of teaching, there is the fundamental dilemma that I described in the section on first standard story of torts classes. The teacher has to decide how she will deal with the oscillation between rules and mush. My strategy was to talk about the contradiction from the first day and to promise the class that, if they would agree to enter into the disorienting whirl of flipping arguments, I would fulfill my side of the bargain by giving them a complete black letter summary of the area at the end of the third week. I also said that, by the time we got to the summary, I thought that they would see that it was practically useless; but I wanted them to have the chance to see for themselves.

First impressions—the students are a mixture. Some are part-time and some full-time, so the ages vary greatly. Most of them are probably older than me, but I'm used to that by now. The clothing of the part-time students suggests middle level office jobs. The full-time students are more casually dressed—but not to be mistaken for undergraduates, this is *law* school after all. Most of them look as though they have read *Paper Chase*—there is a suppressed excitement in the air that seems to be fuelled by fear as well as novelty. All of them seem to have the books. I can already see a few commercial outlines peeking from underneath the new notebooks, but there is a guilty air about the students who possess them—nothing like the brazen, Gilberts-owning boredom of the third year students who the faculty complain about (as though it were entirely the *students'* fault for getting turned off by the schizophrenic messages we peddle to them).

They are much quieter than second and third year students, but not as deferential as some of the other first year classes, probably because of the higher numbers of older students from the part-time program. The school was founded by women and has a less sexist air to it than most such institutions, so there are more women than is normal (over fifty percent in the entering class). But the middle

class bias really shows and there is a depressingly small number of black students. Eyes back to the class. I'm still shuffling through my notes. They look at me with a bright, interested air but they all look a little too tense. I have the urge to tell them to take a deep breath and three valium, but it's a little early for that so I tell them about the way we are going to run the class instead.

This is a crucial time. I can really mess it up here and leave them thinking that I am a vaguely well-meaning incompetent with pretensions to humanism, or a tweed-jacketed *wunderkind* with no idea about what is really going on. It would be much safer to start by droning. "This is torts. Tort law is the body of rules blah, blah. . . ." It would even be safer to assume an earthy, no-nonsense persona that isn't really mine. "Now lookee here Let me tell you something. Law school is like sex, if you don't enjoy it you're not doing it right." (Pause for laughter, three beat count and we're straight into the definition of "intention," to emerge fourteen weeks later with one final earthy comment and thus assure myself the safe and rewarding role of school caricature.) But both of those options involve the death of a little part of me and so here I am, telling them about the politics of the classroom. I describe the other things that their professors will do to them: compulsory attendance policies, humiliation (or more formal sanctions) if they pass more than a certain number of times. Then I try to explain why I think these things are a bad idea and why we should rely on our own individual moral choices (whether to prepare and get a better class out of it, or to go and play pool). The talk has to be light and breezy, even though I feel very serious about all of this. They seem to be impressed by the argument, that if they *don't* do all of this stuff, the more authoritarian teachers will be reinforced in their self-justifying behavior patterns. I move on quickly to the "timeouts."

As a foreigner, I am fascinated by the strange logic of American sports and nothing is more intriguing than the timeouts. The idea that one ought to be able to, literally, "stop time" if things aren't going well seems to be the ultimate metaphysical victory of Americanism. The moving hand writes, but if you don't like what it has written then you can stop it—and this is what I propose to the class. In order to overcome the dreadful feeling of alienation when you lose the thread of what the class is doing, and then sit there feeling stupid, I tell each person that they get three timeouts a week. A timeout is a little reified right—a right to stop the class and have something explained. The idea seems to empower students to interrupt. I have no intention of enforcing the three per week limit; I suggest that the class can increase someone's quota by deciding that

the person asks useful questions. People laugh and agree; already the tension level is way down, and it declines even further as I give out my phone numbers, tell them about office hours and *insist* that they should come and see me whenever they want to.

It is time to move into the material. I start with a description of the structure of the course and I try to tell them what they are going to learn. I explain that we are going to be focusing on arguments for the first few weeks, but promise them that they will get all the rules their hearts could desire at the end of the second week. The tension mounts again as we all open our books. The first case is the standard one, *Vosburg v. Putney*,¹⁵ with its bizarre circumstances and its strained definition of intentionality. I ask if anyone remembers what happened. They blink at the sloppy framing of the question and after a decent interval ten hands go up. The person who answers gives me a word perfect recitation of the facts. There are a few extra legalisms thrown in—trying to show “the expert” that they are not all tyros, after all. We move quickly to “the law.”

An eleven-year-old boy has kicked a fourteen-year-old on the leg, aggravating a previous injury. The incident happened in a school classroom after the teacher called the class to order. Eventually, the leg has to be amputated. The plaintiff won damages of twenty-five hundred dollars, even though the jury in the lower court had answered “no” to the question: “Did the defendant, in touching the plaintiff with his foot, intend to do him any harm?” I continue to ask vague questions. “Why did the court award the other kid the money?” “Does this seem like a good decision to you?” “If the defendant was found not to have intended to hurt the plaintiff, why does the plaintiff recover, particularly considering this is supposed to be *intentional torts*?” The class stonewalls. This is not to say that they don’t answer the questions—they do—but they try to give purely *legal* answers. It is only after I ask whether anyone in the class ever kicked his or her schoolmates in high school that people begin admitting that the decision seemed bizarre. Even then, they stick to what they imagine to be a *legal* interpretation of the case. Someone has found a hornbook definition of intention that matches the one given by the judge (deliberately engaging in a set of muscle contractions, intent to cause some particular consequence being unnecessary). This is repeated several times. When I ask *why* we should adopt that definition, the class looks almost irritated. They begin to suspect that I am playing with them. How are they supposed to know why this crazy old judge said what he said?

15. 80 Wis. 523, 50 N.W. 403 (1891), reprinted in R. EPSTEIN, *supra* note 8, at 4-6.

Other teachers have told me that it is a good idea not to dispel this kind of confusion too early. In fact, they say that I should rely on it to provide energy to the class. I have tried to explain why I don't believe in such an approach—but in the first class, at least, we have to develop a set of problems to be solved.

The next case we look at is *Hurley v. Eddingfield*¹⁶—ostensibly a contracts case about a doctor who refused to treat a person who was seriously ill. The person subsequently died, but the court did not hold the doctor liable because there was no act, merely a failure to act. The obvious question is “why is an eleven-year-old made responsible for a childish prank when a jury thought he had no intention to harm, while a doctor can deliberately refuse to treat someone who will die as a consequence?” This is their first experience of a whole range of mystifying legal distinctions. There is the act/no-act distinction. There is the fact that the weird definition of intention seems to *expand* liability beyond the limits of our expectations, while the no-act rule seems to *contract* it severely. There is the absence of any real explanation of these phenomena within the cases themselves. There is the inexplicable manipulability of these legal distinctions, so that they appear to be simultaneously arbitrary *and* meaningless. Finally, there is the fact that the “legal” resolution of a problem involving a person's life, or a young boy's leg, depends on such dry conceptual distinctions in the first place. No wonder people are looking confused by the time the class ends.

I stop five minutes early and tell them that in the next class we will at least learn to do two things: to flip the distinctions on which the cases supposedly rest and to use this ability to make precedential arguments. I admit to the class that it may take a little longer to understand what the judges and lawyers had to think in order to believe that *these* distinctions were the important ones; but we are going to take this one step at a time.

I feel fairly pleased with the first day. When we start again, I will be able to show them exactly how the arguments get turned upside down. If this is so, we will have learned efficiently in the first three weeks what the standard torts course stretches out over a semester of confusing mixed messages, and we will have learned it in a way that makes the political choices explicit.¹⁷

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16. 156 Ind. 416, 59 N.E. 1058 (1901).

17. A note to the reader: if you want to see what I mean about the way that the arguments are manipulated, I suggest that you turn to the end of this Article and read the first three pages of the Appendix before continuing—if you know the method or aren't interested in it . . . read on.

It is two and a half weeks later. We have been going through the precedential and the policy arguments every day since the first class. In this class we are going to go through a set of practice examples for both kinds of arguments. I have asked the class to use *Hurley* and *Vosburg* as precedent for the decision of another case.¹⁸ A little boy "causes" an old woman to break her hip by failing to push a chair under her in time, when she had started the process of seating herself—apparently relying on his actions. They flip the arguments beautifully. Some make it "a reliance and a failure to act"—like the doctor in *Hurley*—and thus argue that there is no liability. Others focus on the initial movement of the chair, describing the chain of events as "an act and an unforeseen consequence"—like the kick in *Vosburg*—and thus argue that the boy is liable. The ease with which they characterize and re-characterize the ambiguous facts is a wonderful contrast to the embittered oscillation between formalism and off-the-wall irrelevancy that marked their first few efforts.

Next, we went through the examples of linguistic manipulation. The main technique that I wanted to practice here was the use of purposive and formalist arguments. Much of the ideology of law depends on the possibility of interpreting language neutrally and apolitically. Yet lawyers show no hesitation in actually using language in a way that is incompatible with this idea. At this point in the course, I am not going to go into this paradox in any detail. All I want the students to be able to do is to manipulate words by claiming that they have a "plain," or "core," or "real" meaning and then to be able to flip this claim on its head by arguing that a word only has a meaning in a particular situation, informed by a particular set of purposes. Our practical example revolves around the tort of false imprisonment.¹⁹ Can you bring an action under this tort if the police illegally block off one end of a public road and refuse to permit you to pass? By drawing on the opinions in the case we had read, the class can breeze through this example. One student strikes a dramatic pose and declares that "a public thoroughfare is not a prison," another claims that the purpose of the tort is to deter others from interfering with a legally protected interest in free locomotion. It is irrelevant that it would be possible to take an alternative route to the same destination. "As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else?"

18. Based on the facts in *Garrat v. Dailey*, 49 Wash. 2d 499, 304 P.2d 681 (1956), quoted in R. EPSTEIN, *supra* note 8, at 7-8.

19. See *Bird v. Jones*, 115 Eng. Rep. 688 (1845), reprinted in R. EPSTEIN, *supra* note 8, at 1020-22.

Finally, we moved to the "policy arguments." For the last four classes we had been practicing these by breaking them down into types: arguments about judicial administration, institutional competence, morality, deterrence/social utility, and economic arguments. In this class we reviewed them all in the context of a hypothetical case. I chose a case where everything hinged around the recognition or creation of a legally protected interest in freedom from unfair competition. For many students this was the first time that they had realized that sometimes you can injure someone, do them profound economic harm, and have it be completely *legal*. I was going to come back to this point later on, but for the moment we had to concentrate on the arguments.

The facts for the practice exercise were taken from an old case about a banker who manifests his implacable hostility to a local barber by attempting to drive him out of business—bringing in and subsidizing other barbers who will take away all of his customers.²⁰ Should the barber be able to stop the banker from ruining him, and if so how? Slowly at first, but then more confidently, the class produces the matched pairs of arguments that are so important to the rhetoric of legal justification. They argue for flexibility and then for stability, for the issue to be handled by courts and then claim that only the legislature is competent. They claim that the banker's acts were morally neutral even if his intent was malicious and then argue that malice is malice and harm is harm. They claim that aspiring entrepreneurs will flee the marketplace if we allow losers to sue them for competing successfully. Then they flip that argument and claim that we must prevent socially harmful acts of malice, both for moral reasons and to prevent wasteful economic activity at below cost.

By the end of the discussion, there is a sense of hilarity as the students try out these new-found skills. People are giggling as they find themselves making the arguments—almost as though they don't believe it is really *them*. As the surprised murmurs die down I hand out the document which is reproduced as an Appendix to this Article. People in the class start laughing as they leaf through it. "But its all *in here!*" one person says. If it was a shock to find out that they were capable of making the arguments, it is even stranger to find out that I could have written them all down before the class—sometimes actually catching the words that people used in making their arguments.

20. *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909), reprinted in R. EPSTEIN, *supra* note 8, at 1362.

The fact that I am pleased at this double surprise on their part *could* be just an ego trip, but I don't think that it is. If I knew that they would learn to make these arguments, and could even predict how they could phrase them, it is because I had gone through the same process, but more slowly and painfully—each step of progress being marked by the abandonment of some political ideal that had seemed very important up until then. But my pleasure at their progress does not only come from the fact that I can spare them all of this. It is also an affirmation that, through the process of teaching, I can retrace my steps, discovering along the way all of the personality changes produced by my own encounter with schizophrenic pedagogy and the ideology of the legal profession. And by doing *that*, I make myself better at my job—better able to imaginatively grasp what they are going through and more intimately connected to it.

* * *

A brisk night. I walk out and nearly run into a person from my torts class. I say hello and he gives me a perfectly courteous, but rather hurried, hi. It makes me happy too because it's the first time I haven't been called "Professor," the first time the hi wasn't in capital letters. The next day he apologizes to me for five minutes, explaining that he hadn't seen me because of the darkness and that he had thought it was "just another student." Oh well.

* * *

It is the end of this section of the torts course. I am finishing up, as I said I would, with a "black letter" summary. As we were going through the argumentative techniques, I often felt that it was only the promise of this "hard stuff" that kept the class with me. The arguments, after all, are harder to learn and more personally destabilizing than any body of rules. I am worried about what will happen now that we are finally here. Will they forget the surge of power they got in the last class when they found themselves producing arguments that they did not know they could? Will they think that this is the "real" stuff? I joke about all of this a little nervously and then I start. A wonderful thing happens. The first rule is received in silence, save for hurried scribbling. Then, as the ludicrousness of this stilted verbal construction—full of references to terms they know to be infinitely manipulable—penetrates their consciousnesses . . . they laugh. They do so quietly at first, and then with increasing hilarity. I feel as though they have perceived my anxiety about how they would react and that this makes the whole affair doubly funny. For the first time it feels as though we are really

a community—bound by shared moments of sudden mutual comprehension. But I finish up the rule summary anyway. Just to be sure.

VI. PUBLIC/PRIVATE DISTINCTION: SEX, ECONOMICS, AND PROPERTY RIGHTS

One of the most interesting things about class discussion is the way in which it allows us to see inside each other's heads. This is more than psychic voyeurism. It corrects, at least partially, a kind of mental astigmatism that would otherwise distort our vision of what went on in each class period. The teacher habitually makes the mistake of creating a fantasy group called "the class," which reacts in certain known ways to the ideas and images presented to "it," while many of the students seem to confidently universalize their own perceptions of what is going on—blithely asserting that "everyone" thought the economic stuff was off-the-wall. When this mutual objectification is undermined, strange energies start to flow. This process is clearest when the class comes to talk about torts in the "private sphere."

About half way through the torts course, we got to the question of whether someone should be able to recover the costs of bringing up a child that would not have been born had their doctor not messed up a sterilization operation. This issue, which was not-so-euphemistically referred to as "the problem of the unwanted child," brought out an amazing range of visceral reactions to love, pain, family life, and the appropriate limits of thinking in monetary damage terms. The most surprising reversals came from those students who had been the quickest to embrace economic explanations of tort rules. I had not yet reached any of the more complicated critiques of cost-benefit analysis, and so a lot of discussion had focused on the question of *whether* one could always measure loss in economic terms, with the assumed premise being that, *if one could*, economic analysis would be preferable to the "ethical intuitionism" that now seemed to them to underlie formalistic legal argument. Those who had embraced the welcome certainty of economic analysis had been insisting that one could quantify the loss of an arm or a leg, or even the pain of a tragedy. They had thus been able to flaunt the power of their newly acquired economic rationality—showing particular delight in sabotaging their classmates' attempts to use "fuzzy" ethical standards to resolve questions of liability.

Suddenly we had reached a question where quantification seemed not only possible but positively easy—at least compared to the eco-

conomic measurement of a lifetime of agony, or the ruining of a beautiful landscape. Of course, one could argue about the precise method to be applied—how to take into account the “free rider” effect if the parents have already invested in toys, cots, and child-proof housing, or the level of education that the negligent doctor could be required to pay for—but by this stage of the course, most of the students would brush over such questions confidently, or even chide me for focusing on “niggly details.” Yet there is a distinct hesitation in the way that they are discussing the issue. I press them on it.

The students who prefer noneconomic arguments are hanging back. As I glance at a few of them, I notice that their body language has changed from that of participant to that of spectator. It is as though they were expecting the economists among them to sweep in and present a simple answer to the problem—“the doctor should be forced to internalize the costs of his or her negligent acts.” But the economically minded students are not rising to the bait. Eventually one of them blurts out something about “having to draw the line somewhere”—kids are a “very private matter” and the joy that they bring is an “adequate setoff for any loss.” There is a sudden and intense release of energy—all of the frustration that the rest of the class has been feeling at the apparently seamless web of economic certainty is instantaneously transferred into scorn for this attempt to back away from the conclusions that the analysis seems to imply. It becomes apparent that even the anti-economic students have picked up a lot of the standard argumentative moves. They ridicule the line drawing argument as being an attempt to minimize the importance of the “consumer preferences” (as they archly put it), which were manifested both by the original operation and the decision to sue. They insist that it is impossible to limit the applicability of economic decision making by saying that it did not apply to the “private sphere.” Surely this simply reintroduces in debates about the “sphere of applicability” of economic argument all of the problems of indeterminacy we had been trying to avoid in debates about substance?

The student who had first responded is in a quandary. He finds himself repeating all the arguments that he had derided in the past. Driven to explain this contradiction, he paints a picture of the private sphere of our lives that reminds me of Christopher Lasch’s *Haven in a Heartless World*.²¹ We need a sphere of warm mutual trust

21. C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977).

Most of the writing on the modern family takes for granted the “isolation” of the

and understanding to refresh ourselves after our daily exposure to the brutal logic of the market place. In this world, which encompasses family life, "and love and stuff, I guess," it would be highly inappropriate to think in the terms that were appropriate for the public world of the market. In fact, the private sphere is so fragile that it would be destroyed just by exposing it to the ruthless searchlight of economic analysis. Far from making the family "whole" again, allowing parents to recover damages for an unwanted child would undermine trust within families, and thus would undermine the institution of the family itself.

People are interrupting, asking him to distinguish between his position on this case and his position on damages for pain and suffering and generally giving him a hard time. I ask them to let him speak, but he says he has finished anyway and in the momentary silence the man sitting next to him suddenly speaks up. "I agree with Jo." Everyone waits for the argument. "I mean, these people," gesturing toward the casebook, "these people should have known. You play with fire, you're going to get burned." There is a fractional pause and then everyone is laughing or asking questions. "Having sex is playing with fire?" asks a woman from the back of the class, in apparently honest incomprehension. There is another wave of laughter. Somebody else is saying something about the doctor being the one "who *burned* them because he didn't do his job right." There are noises of general agreement. The person who has just spoken is still trying to make his point; the people around him are stopped from laughing by the obvious force of his feelings.

"Look," he says, turning round in his seat to address the rest of the class (a rarity, because people generally address their comments to me) "you have one of these operations, you know its not a hundred percent sure . . . you take your chances. You know what you're doing—you don't come whining to the doctor just because

nuclear family not only from the kinship system but from the world of work. It assumes that this isolation makes the family impervious to outside influences. In reality, the modern world intrudes at every point and obliterates its privacy. The sanctity of the home is a sham in a world dominated by giant corporations and by the apparatus of mass promotion. Bourgeois society has always held out the promise that private satisfactions will compensate for the reduction of work to a routine, but at the same time it undermines this compromise by organizing leisure itself as an industry. Increasingly the same forces that have impoverished work and civic life invade the private realm of its last stronghold, the family. The tension between the family and the economic and political order, which in an earlier stage of bourgeois society protected children and adolescents from the full impact of the market, gradually abates. The family, drained of the emotional intensity that formerly characterized domestic relations, socializes the young into the easygoing, low-keyed encounters that predominate in the outside world as well.

Id. at xvii.

your life doesn't turn out as *uncomplicated* as you'd like it to be." "What do you want people to do? Abstain!!?" says a woman to his left. The class roars again. I am unable to figure him out. Does he view sex as an essentially selfish and potentially dangerous activity that cannot be the source of any *social* obligation? Or is he really making the same point as the person who sits next to him by stressing the *private* character of decisions about children? Maybe it is even some combination of the two—a feeling that "planned parenthood" is inherently Yuppie?

I am learning something about teaching. His view is a minority one, either unpopular or not fully understood. He doesn't often participate in class. This scene may well shape his attitude to the whole of law school. I feel as though I should do something, although I have no idea what. The situation does have its undeniable Fellini-esque aspects, and absurdity does not go well with the making of reflective moral and pedagogical decisions. Hundreds of decisions like this are hidden away in the pages of this Article. Most of them were probably as bad as my solution in this case (I tried to quiet the class down, and insisted that they should hear him out). But my own insecurity about the choices that I make does not lead me to believe that it is a good idea for legal scholarship to ignore this kind of problem because it is seen to be within the realm of the personal and particular, rather than the public and universal.

His comment is not the only puzzle I am facing. As the laughter dies away, I am trying to make one of those hard decisions about what to do next. There is all this energy floating around in the room and the question is, what to do with it. I see two main options. For a long time, I have been wanting to do a class on the strange way that we divide up our lives into the public and private spheres—each with a different appropriate personality. I think that it is vital that we cover this at some point during class because I cannot see any way in which these people will be able to make sense of their lives (particularly as lawyers) if they simply accept that it is *natural* to divide your being up into two halves—organization person by day and swinger by night. One of my friends had described this as a split personality: Alan Alda in the private realm, Hobbesian brute in the public. I suppose that I consider it a sort of ethical imperative to raise this issue at some point—closer to real ethics than the moneyed platitudes of the Code of Professional Responsibility, anyway. The second option is intimately related to the first, but seems to be worth a whole class on its own. I want to talk about the public/private split in law, and, in particular, in tort law. The discussion we have been having up until now gives me neat entry points into

both options. The example of the reluctance to treat an unexpected child as "an externality" has implications for both the division of law into public and private and for the existential experience that the social world *feels* as though it was naturally carved up into two realms, one public and calculating, the other private and nurturing.

All this goes through my head before the laughter stops, and in one of those lemming-like decisions that seem irresistible when there is lots of energy in the class, I decide to try to do both at once. But first we need another example. Earlier on in the course, we had touched briefly on the *Ives*²² case—a New York Supreme Court decision from 1911 that found the state workers' compensation statute to be unconstitutional because, by subjecting employers to a higher duty of care than the negligence standard, the statute was depriving the employers of their property without due process of law.²³ At that point in the course, we had simply been working out the basic arguments for and against a negligence system of liability, so we had not gone very deeply into the case. Even so, several students had commented on the odd circumlocution by which the court turned the employer's interest in maintaining the negligence system into a *property* right. The casebook contains a great quote from one of the concurring opinions in *Ives*, a quote which I think I can use to illustrate the assumptions that the judges are making about private law. Doing *that* would then allow me to finish up with a discussion of how those assumptions are reflected in the radically different situation we have been discussing so far, the measure of damages for an unwanted pregnancy. I read out the quote:

I know of no principle on which one can be compelled to indemnify another for loss unless it is based on contractual obligation or fault. It might as well be argued in support of a law requiring a man to pay his neighbor's debts that the common law requires each man to pay his own debts, and the statute in question was a mere modification of the common law so as to require each to pay his neighbor's debts.²⁴

I ask the class what this judge could have meant. Why is it not just as much of a "taking" of property whenever a court forces a defendant to pay a damages judgment under negligence? They come up with two theories. The first is that the concept of property includes all of the rules of common law that exist at that moment and that any change in any of these rules constitutes a taking of property.

22. *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), *quoted in* R. EPSTEIN, *supra* note 8, at 913-15.

23. *Id.* at 294-95, 94 N.E. at 439-40.

24. *Id.* at 318-19, 94 N.E. at 449.

This seems impossible. It would mean that even the most minor reinterpretation of a rule could be attacked as unconstitutional. Someone points out that, even in the cases where a dissent is criticizing a majority for changing a well settled rule, they normally concentrate on the idea that the legislative function is being usurped, rather than the idea that property rights are being interfered with by the organs of the state. The second theory is that there is some *specially authoritative* set of ground rules under which property is held, transferred, or used to compensate victims for particular kinds of harm. This set of rules does not have the same status as all the other sets of rules that we could imagine. In other words, according to this theory, it is simply not true that a negligence system of workers' compensation and a system of strict liability are equally "political," value-laden systems of public control of the use and management of property. Somehow the negligence system is seen as being a natural, or neutral, or freely chosen feature of the private sphere, not an external, public and inherently political interference with that sphere. This second theory seems a more plausible explanation of the judge's ideas than the first theory, but it is also more complicated.²⁵

Now is the time to use the background in classical legal thought that I have tried to develop over the course of the semester.²⁶ My claim is that, although we have demolished and re-demolished the classical system, although we can now laugh cynically at cases like *Ives*, we are nevertheless still firmly ensnared in one aspect of the classical system—its distinction between private and public law. Everything, from debates about "getting the government off our

25. See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 11 (1927); Hale, *Bargaining and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Horwitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423 (1982); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349 (1982).

26. "Classical legal thought" is a term used to describe the high period of American legal formalism. The period is generally supposed to have lasted from 1850-1940 and it is marked by a claim that law can be logically deduced from the structure of the free market and the democracy, (or divined unambiguously from the words of statutory and constitutional documents) and can then be neutrally applied to fact situations in such a way as to produce determinate results. In order to support these claims, classical theorists made use of spatial metaphors ("spheres" or "line drawing") as well as a linguistic cult of "the core meaning." See generally Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (1980); Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (D. Kairys ed. 1982). When one uses an abstraction such as classical legal thought in a class, there is always the fear that one is simply replacing one kind of reification (rule-fetishism) with a more sophisticated kind (period-fetishism). This tension cannot be avoided; my own partial solution was to point out the historical anomalies and the procrustean effect of the classical and realist categories, but at the same time to argue that the categorization did capture something important about the changing utopian images to which legal argument and judicial rhetoric appealed.

backs" to the structure of the law school curriculum, reinforces the message that "the market" has a natural or neutral set of "needs" that the edifice of private law fulfills. Thus, the rules of contract and tort, the decisions as to whether to enforce imperfectly executed contracts, or to give restitution to a person who has been contributorily negligent, are seen as qualitatively different from the rules of antitrust or labor law. Because the private law rules are seen as the corollary of the free market system, they have a higher, more authoritative status than the public law rules—rules that represent a political interference with the normal operation of the market. Those who dismiss *Ives* as the last gasp of an intellectually bankrupt set of jurists are more likely to concentrate on the horrors of workplace tort law in 1905 than they are to challenge directly the logic of the decision. There is a very good reason for this—most of them share the same set of premises about public and private law that are expressed in such an extreme manner in *Ives*.

I try to illustrate the points that I have made by using the standard examples. Is private property subject to public control? "Not in *America*, anyway" says one person who has been teasing me about my British origins. What about speed limits, environmental protection regulations, food and drug law, zoning rules, and so on? Don't they regulate the use of private property? Someone comments that this is precisely the appeal of the New Right—the people who are going to "get government off our backs" and get rid of the limitations that this nation has put on the use of private property since the 1930's. I ask the class if this seems like a generally fair statement of the way the New Right perceives the regulation of "private property." They agree without much enthusiasm. But that brings us back to the very question we were discussing. Is there some qualitative difference between the rules of contract and tort and the way *they* affect property and the rules and regulations of environmental law and the way that *they* affect property? Surely not. A contract rule that voids improperly executed agreements, or changes the measure of damages, will have distributive consequences. It will cause a redistribution of social resources—taking money away from "careless" people, or stock speculators who buy on a rising market and, effectively, transferring it to others. The same is true, perhaps more obviously, of the rules of negligence, or of any other system of tort liability. And it is also true of the "regulatory," legislative restrictions—the ones that are (wrongly) thought about as being the only kind of interference on the otherwise "pure rights" of the private sphere and of private property.

The consequences of ignoring the political and distributive conse-

quences of "private law" are fairly obvious. "Private law" comes to seem more authoritative, central, and neutral, while "public" or regulatory law is given a marginal and more vulnerable status. It is for this reason, above all others, that the second standard story of first year classes is necessary. If any change of the existing set of "private law rules" is going to be seen as an interference with some, supposedly pure, market logic, the legal culture is going to need a very appealing background theory to justify this "interference." What could be better than the familiar canard that "progress" is sweeping us in the direction of more regulation. If one was in the business of searching for reified abstractions that can justify almost anything (a business not unknown to lawyers), then one would be hard put to choose between "progress" and "the market."

Of course, if one was to admit that "private" and "public" law, laissez-faire and regulation, the old rules and the changes in them—that all of these were political choices with distributive consequences, then it would no longer be necessary to use this kind of equivocation. But to admit such a thing would mean accepting some fairly radical conclusions. If one believes in the public/private picture of the world, then it seems as though the private realm has been purged of politics. Thus, the existing distribution of wealth, risk, etc. is considered presumptively legitimate—we reserve our criticism for the exercise of *public* power, to which we apply a whole range of critical standards (equal protection, due process, etc.)—that, if applied to the "private sphere," would undermine much of the economic structure of the Western world. What if Exxon had to go through some form of "due process" with all interested parties before transferring its investment? What if we decided that democracy was a good idea on the shop floor as well as in the more familiar quadrennial media extravaganzas?

Left to my own devices, I would probably have gone on and on about the iniquity of this indefensible and artificial distinction, driving the message into the ground and boring everyone to distraction. Luckily, I am interrupted by someone who wants to know how all of this relates to the discussion that we had about the "unwanted child." I try to turn the question around. What can we take from our discussion of the *Ives* case that will help us to understand the debate we had about the child? This question provokes some turmoil. A person who had participated in the earlier discussion is the first to express a frustration that is being manifested by the body language of the whole class:

The bottom line of what worries me about all of this is some

kind of conflict between what I felt in each discussion. When we were talking about the kid that the parents didn't want, I was feeling, 'the courts have no business being involved with something like this.' And you said that this had a lot to do with a belief that there is a separate 'private sphere' where government should not interfere and where people act differently toward each other. And then when we were talking about the *Ives* case where you were saying, if I understood you right, that it depended on the same sort of idea—separate public and private realms, each with their own logic. But you were arguing that this idea was simply wrong—that all the rules were public, or that you could make them all appear private, that you could mush it around and make it come out anyway that you wanted. Now the good thing about seeing this, at least for me, is that it stops you being fooled by the things people say to you—statements that seem to be arguments, but are actually just line drawing. 'We can't regulate what Union Carbide does in other countries because its in the private sphere.'²⁷ But the trouble is that, if you can't make arguments like that one, then I can't say courts shouldn't mess around with this stuff when we get to the case of the unwanted kid. And the thing that really bothers me is that *I believe it about the kid*. I mean it just *feels right to me* that families and stuff are different from the rest of the world and we should respect that 'differentness' when we make decisions. And I felt you were telling us that you thought we should give up that sort of thinking—that it was the same as the thing that the judge did in *Ives* and that most people are still doing, even though they know enough now not to admit that's what they are doing. . . .

All of a sudden she stops talking, suddenly wondering if she'd talked too long, if her classmates would think she was dumb, or out in the stratosphere. I gibber frantically because my desire to tell her that I think that what she has said is wonderful and my fear of either

27. She was referring to the Bhopal disaster which had just happened and which was mentioned in class almost every day. On December 3, 1984, poisonous gas escaped from a pesticide factory in Bhopal, India. Over 2,000 people died and many more were injured. Most of the victims were poor shantytown dwellers who lived near the factory. The factory was owned by Union Carbide (India) which was in turn owned 50.9% by the U.S. multinational Union Carbide Corporation (U.C.C.) and 49.1% by the Indian government. A safety report had criticized the preventative measures at the plant and had expressed "major concern" for worker safety. This report was apparently not acted on, according to a government inquiry after the disaster. Suits claiming billions of dollars have been filed against U.C.C. in the United States. Mr. Warren Anderson, Chief Executive of U.C.C., has said that the corporation will "fight right to the end" any legal allegations of negligence. Meanwhile, U.C.C. appears to be attempting to negotiate financial settlements. The disaster and its legal aftermath have been used in the media to symbolize the venality of lawyers, particularly "ambulance chasing tort lawyers." However, there appears to be no room in the media iconography for a concept such as "class violence through the distribution of risk." For background, see *Poison Gas Disaster in Bhopal*, in 31 KEESE'S CONTEMPORARY ARCHIVES: RECORD OF WORLD EVENTS 33467-468 (R. Fraser ed. 1985).

being, or appearing to be patronizing, are warring with each other. I am saved from my own incompetence by the intervention of the law and economics devotee who had started the whole discussion off. He agrees with what she said. But he says that he is even more confused than she had professed herself to be.

"I feel like I am collapsing all of my arguments even as I make them. I started off saying that economic type of thinking was too cold and inhuman to be applied to a problem like this. So that sounds as though we are going to lessen the role of economics in the private sphere. But I also think that the government should be less involved in the private sphere. That seemed to mean that a lot of the decisions that the government makes at the moment, like setting airline fares, should be made by market forces instead—and *that* sounds like we are going to *expand* the role of economic thinking in the private sphere—that we are going to substitute it for governmental decision making. And then you seem to be saying that the state is 'regulating' economic life just as much when a court applies a rule of contract or tort law as when the E.P.A. promulgates a new set of regulations. And that seems to collapse the distinction between 'leaving it to the market,' and regulating it, because the set of rules that constitutes 'laissez faire economics' is just as much a choice, just as much a political decision, as the regulations which are portrayed as a political interference with the market. You're saying, I guess, that the market is not an operative concept; it doesn't tell you which set of rules and entitlements to adopt—so the idea of 'deducing' the private law rules from the logic of the market is just silly. That is the part I understand. What I want you to explain is . . . well, two things. If the distinction between the public and private sphere doesn't make any sense, how is it that it can feel right when we are talking about the kid? And if it doesn't make any sense, what are we supposed to do—I mean, does that mean I'm supposed to love the senior partner in my law firm, or tell my kids that I'm going to charge them room and board?"

I am worried that the question asked by the woman who spoke first has been defused of its emotional impact because it has just been repeated at the end of a long and fairly intricate statement about economics and regulation. I deal with it first. My own answer is that both the idea of a public and the idea of a private sphere contain important utopian aspirations. Any interesting or appealing utopia will have a pretty strong emphasis on nurturing, loving, noninstrumental behavior. It will probably also depend on a high degree of mutual trust and an extreme dislike of formal methods of dispute resolution. I think these kinds of aspirations are reflected in the adverse reactions that some people in the class showed when it

seemed as though we were proposing "interference with the family;" whether the family is, *at the moment*, actually an incarnation of those values, or whether it is an oversentimentalized set of power relations, is more of an open question.²⁸ It is also an open question whether it ought to be up to the family members themselves to decide whether or not to enter into something as apparently nonfamilial as a law suit for the economic means to support one family member.

But you can feel that it is deeply wrong for courts to get involved with this kind of stuff without believing that there are two absolutely separate realms, each with its own logic. You certainly do not need to believe that the division of the law into public and private is somehow legitimated by the feelings that you have about the case of the unwanted child. There is an important connection between private law and the idea of "private life;" but it is a metaphorical one—an imaginative leap that we can choose to accept or reject. Even if you thought that the best available ways of living are represented by the patriarchal nuclear family and the radical disjunction between leisure and work, you would *still* be wrong to think that there is any necessary shape to the market and doubly wrong to think that this shape was expressed by private law.

This double error is described most obviously in the comments made by the last person who had spoken. He had pointed out that his ideas about "privateness" seemed to lead to contradictory attitudes towards economic thinking and the operation of the market. If you juxtapose "the market" against the idea of the state or the government, "the market" seems to be a definitionally *private* institution, with the state being obviously *public*. This is something like the analysis carried out by the court in *Ives*—the judges are concerned with "public interference" in "private economic transactions" between workers and employers. But when you juxtapose the market, not with the state, but with the family, then the market looks like the cruel, calculating world of *public* instrumental behavior and the family appears to be the world of *private* and sheltered subjectivity. In other words, the distinction falls apart as soon as you try to apply it—in fact its appeal depends in large part on its ability to be all things to all people.

It is precisely the *incoherence* of the distinction that explains why, in the workplace, one has *neither* the formal equality of the "public" sphere, *nor* the familial trust of the "private" sphere. That is why it

28. See generally A. OAKLEY, SUBJECT WOMAN (1982); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

is ludicrous to think of loving the senior partner—the private sphere is not really so “private.”

This explanation makes me happy. I feel as though I have explained my own very strong feelings about these issues without forcing them on the class. I can see that quite a few people disagree with my ideas—we have a good discussion afterwards in which there are eloquent and convincing statements of the conservative belief that a free market, almost identical to the one produced by American capitalism, is necessary for individual liberty. People now see the public/private split, however, as something to be argued for, rather than as a basic axiom about the world which we will use to decide “the problem of the unwanted child,” or the constitutionality of a worker’s compensation scheme. So the class worked . . . after a fashion. I lectured far too much; it was all probably unrepeatable; and most classes probably would have insisted I give up all this fancy stuff and “get to the rules.” But for a moment there was this shared feeling of elation and vertigo as we contemplated the fragility and contingency of our most basic political assumptions about the public and the private: sex, economics, and property rights.

* * *

I am reviewed. The person who comes to see my class leaves before I get to the main point: the way that the classical legal thinkers and judges actually felt constrained by their own ideology. It wasn’t just “the way the judge wanted it to come out.” It was a way of seeing the world which seemed legitimate precisely to the extent that it achieved a credible status among the legal elite as being constraining rather than a manipulable way of categorizing and thus creating reality. After class the reviewer tells me that I didn’t talk enough about the fact that “the rules of 19th century tort law provided a class-biased subsidy to infant industries.” Actually we had just spent two weeks covering class violence through the legal system and that is what I should have told him. Instead, I try to explain my ideas about the strange connection between formalism and social power. I am tired and incoherent and fail to explain myself adequately. He is not convinced. I go home frustrated and take out my anger on some hapless dead legal theorist.

VII. PRIVACY, CONTRIBUTORY NEGLIGENCE, AND NO DUTY TO ACT

I mentioned at the beginning of the Article that one of my main goals was to deal with the way that tort law moved from the set of metaphoric associations that we refer to as classical legal thought to those that we refer to as legal realism. This shift is standard fare in a

torts course. It fits neatly into the historicist idea of law that professors peddle in many first year courses. But I wanted to deal with an aspect of this transformation that is often neglected: the fact that both classical legal thought and legal realism each contained contradictory utopian blueprints—visions of the way the world is and the way it should be—that have internal contradictions and that conflict with each other. I wanted to explain these utopian political and legal visions by comparing the ideas behind the doctrine of contributory negligence, the requirement of privity in a tort suit based on a contract, and the rule that there is “no duty to act” under tort law.

Each of these doctrines falls on the classical side of the division between classical legal thought and realism. In the areas we are looking at, the doctrinal progression sketched out in most courses seems to run something like this:

Contributory Negligence	—————>	Comparative Negligence
Privity Requirement	—————>	Foreseeability/Reliance
No Duty to Act	—————>	Samaritan Statutes (and some use of reliance or “special relationships”)

This parallels the other major doctrinal progressions, both in torts and in contracts. The standard examples are:

Will Theory of Contract	—————>	Reliance Theory of Contract
Moral Definition of Negligence	—————>	Economic Definition of Negligence
Trend Toward Negligence Regime	—————>	Trend Toward Strict Liability
Workplace Law Dependent on Fellow Servant Rule, Volenti, Contributory Negligence.	—————>	Worker's Compensation

I chose to concentrate on privity, no duty to act, and contributory negligence, because those doctrines provide another dimension to the transformation of American tort law than that which is offered by the standard picture of “a rigid set of rules that gave a subsidy to infant industries.” I begin the discussion by comparing the doctrines, taking a tack that Duncan Kennedy had suggested to me. The class starts by developing rough explanations of each one:

Privity—If I wish to bring a tort suit based on a contractual duty, I must be privy to that contract—a direct beneficiary of the rights and obligations that flow from it.

No Duty To Act—I have no duty to act affirmatively to help others in jeopardy even if I could save them at little or no risk to myself.

Contributory Negligence—If I am injured by the negligence of another, I may nevertheless be unable to recover if I have myself been negligent and my negligence has contributed to my own injury.

Now we are ready to compare these doctrines. People comment that each one tended to limit liability and that they have all been superceded to some extent by a set of doctrines that have expanded liability. Apart from this, they can see little in common between them. I ask them to relate each of the doctrines to the discussion we have been carrying on about the differences between the Learned Hand (economic) definition of negligence and the "reasonable person" (moral) definition. This line of thought draws a blank at first and I am beginning to wonder whether I should give the whole thing up or, even worse, lecture on it, running the risk that I will lose everyone's attention and interest. Then one of the people who has been arguing for the superiority of the economic approach to tort law suggests that this is yet another example of the failure of the more formalistic judges to see the advantages of a "scientific" approach to problems of liability. She points out that, in each doctrine, the defendant may have been negligent according to the Hand Formula and yet still escape liability.

For example, it may be that I could save you from drowning at a cost to me of one dollar (for one minute of my time)—the "cost" of your death being one million dollars and the risk of your death (i.e. its likelihood if I do not throw you a rope) being seventy-five percent. One dollar is certainly less than \$750,000 ($\$1,000,000 \times 75\%$)—so it seems that I am "Hand Negligent." Yet I am not liable—there is "no duty to act." A skeptic immediately comments that this is precisely the problem, although my action would be negligent according to the Hand formula if there were a duty, there is *no duty*—and thus the cost-benefit calculation need never take place. He says that the same point applies to all the other doctrines—if there is no privity then no duty exists and contributory negligence could be thought of as negating the other person's duty to me ("no right without a remedy"—a definitional argument that evinces a few grins after the way that we trashed such arguments in the first three weeks).

But the woman who is arguing for economic approaches is not convinced. Her critique goes deeper. She does not want the cost-benefit calculation to be limited to the analysis of whether the duty has been *broken*. She wants it also to replace the stage at which one decides *whether a duty existed in the first place*. No duties simply *exist*, she points out, it is always a choice whether or not to create a class of liability. When we make that sort of decision, we should rely on a scientific analysis of the costs and benefits. Traditional legal thinking cannot give us such an analysis, which is why we have the formalistic division between the question of whether a duty exists and the

question of whether that duty has been broken. An economic analysis would collapse these two questions, dealing fairly with each of the issues posed by the doctrines that we are considering, on the basis of what would be the most efficient solution. The traditional method only obscures the key issue (whether we want someone to be liable) by pretending that there are *things* called "duties" that either do, or do not "exist." She finishes with a triumphant flourish: "where do you think these 'duties' come from, anyway? God?"

I ask her why she thought the classicists had not structured these doctrines in the way that she suggested. She says that she doesn't know, but a guy in the back of the room who had described himself to me as an "errant anthropologist" puts up his hand. At first blush, he says, one would think it was because they wanted a set of rules that would favor capital and not labor. Privity and contributory negligence, at least, seem to do that. Yet the real story may be more complicated. He suggests that one could construct a legal system based on economic analysis that had the same kind of distributive consequences as the system of nineteenth century tort law. The explanation, therefore, cannot be an *entirely* instrumental one, even if we assume a conspiracy theory view of the world. It is obvious that the classicists preferred dealing with these problems on a level of highly abstract legality, but it is unclear *why*.

I offer my own explanation. Since the beginning of the semester, I have been pointing out that "neutrality" seems to be basic to the ideology of law. The judges and the lawyers seem to rest their authority on the claim that they are doing something different than merely arguing about politics. Even the teachers who say that "it's all policy" spend a considerable proportion of their time acting as though it was *not* all policy. Of course, each period in legal thought has focused on a different way of making law look as though it was neutral and apolitical. In fact, it is the change in the style of the arguments about neutrality that marks the new period. This is especially true of classical legal thought. Perhaps something interesting will happen if we take the doctrines we have been considering today and look at them through the lens of this fascination with neutrality and objectivity. The people in the class smile, the special smile reserved for the occasions when the teacher says, "perhaps if we look at it this way. . . ."

Our main source of information about the classical period had been an article by Elizabeth Mensch that I included in the recommended reading.²⁹ Mensch points out that the classical thinkers

29. Mensch, *supra* note 26.

rested their claims to neutrality on their ability to abstract legal categories from the annoying detail, conflict, and complexity of everyday social life.³⁰ We don't have a separate set of rules for innkeepers and their guests, landlords and their tenants, merchants and their customers; instead, we have CONTRACT—an abstract *legal* relationship that we can “find” in each of these circumstances. By dealing with these purely *legal* categories, we immunize ourselves from claims of bias, or political “tilt” that might otherwise be levelled at the legal system. It may seem ridiculous to think that a powerful corporation and a group of nonunionized workers can bargain with each other as “free, contracting parties,” but this is only until we realize that the legal abstraction of “free contract” has nothing to do with any ideas we might have about equality of bargaining power. These legal abstractions were supposed to be logical deductions from the most basic features of the free market system. So if the classical notion of what will count as legal “duress” includes a gun to the head, but excludes the power to starve someone around to your way of thinking, then there is nothing *political* about this; it is a necessary logical abstraction. Or so say the classicists.

But how does all of this apply to the three doctrines that we are looking at today? In each case where the doctrines would operate to deny recovery there are *connections* between the parties. I may have feelings of betrayal or suffer severe financial loss when the car manufacturer tells me that it is not liable for the defects in my car and that I will have to sue the bankrupt car dealer because there is no privity of contract with anyone else. I appear to be connected to the drowning infant whom I refuse to save by at least the bonds of a common mortality, if not by an expectation of altruism. The negligent person, who injures me when I am being contributorily negligent, has apparently forged between us the kind of legal connection normally necessary to establish her liability for my harm. To repeat, there *are* links, whether of harm, moral expectation, custom, or vulgar causation, on which one could base liability. Yet, at least according to the classical vision, they are the wrong *kind* of connections on which to base the necessary legal abstractions.

Why are they the wrong kind of connections? I pointed out that, since the classical vision purports to deduce its abstractions from the basic features of economic reality, it must recreate in its doctrinal structure the same picture of human relations as is prefigured in the strangely dehumanized world of microeconomics. [The woman who was advocating economic case-by-case justice is frowning. It

30. *Id.* at 19-26.

looks as though she had always seen classical legal thought as a set of disembodied concepts, not as reifications of the operative terms in classical economics.] Or, to be more precise, it must reproduce the same picture of people that is to be found in the writings of economists at that time. This picture is different (if no less apologetic) than the picture drawn by today's economists. *This* is the reason that these three doctrines operate in what appears now to be an extremely bizarre way. In making it appear that the legal system was neutral and objective, the classical legal thinkers depended on making their political choices invisible, even from themselves. In contract law they claimed to be merely enforcing the will of free contracting parties within a market system, even though their ideas about consent, formality, duress, and a hundred other doctrines meant that they would inevitably be doing more than that. In tort law they claimed that they were merely "making the injured party whole again," even though it was obvious that they were not granting recovery to everyone who was injured by another person's negligence, let alone everyone who was injured at all. (Remember the case of the barber and the banker?)³¹

I feel quite pleased with my formulation of the aims of classical legal thought. Then as I look out into the class, I see that I have lost at least half of the people in the room. I question them about what they have been doing in contracts and it turns out that they really haven't covered reliance at all yet, so they don't know that there are any alternatives to thinking in the way that I have described, nor can they see anything wrong with basing all of your contract rules on the notion of the congruence of wills. We spend about five minutes going through the political choices one would have to make to decide which acts of will deserved recognition. A couple of people use their time outs—asking me to explain reliance again, or to show them how to flip "Will Theory" back and forth. As soon as I have done so, we start again.

The conceptual difficulties we have been talking about make the classical theorist's task harder in torts than it is in contracts. All the contract theorist has to do is to claim that her formulation of doctrine is a pure structure for the re-presentation of consent. The tort theorist and the judge who is writing an opinion in the classical period have to use more eclectic sources to maintain the same anaesthetic appearance of apolitical legitimacy in their process of abstraction. This gives classical tort law a kind of patchwork feel to it. Sometimes the doctrine relies on background ideas about moral-

31. See *supra* notes 19-20 and accompanying text.

ity, as in the "general" duty not to be negligent. The doctrine does not appear to depend on a political choice because it replicates that which goes without saying—"people should pay for the damage they cause." One might be able to use this source of legitimacy even when the knee jerk moral responses are more contentious—the contributory negligence idea that one must have absolutely clean hands for moral or legal victory is more than balanced by a more forgiving, altruistic vision.³² But even if one plays around with the content of this background idea of morality, it is clear that sometimes it has been dramatically rejected.

When we get to the situation of the drowning child who is left to her fate by her potential rescuer there is not much doubt that these "background ideas about morality" would condemn the failure to rescue. Yet tort doctrine makes an abrupt switch from the reliance on community morality. Instead it jumps to the vision of society presented by laissez-faire economics and social theory. There is "no duty to act" because we are all atomistic monads who cannot be diverted from our own private ends unless by a *legal* duty. In other words, this is a circular argument that deals with the question, "is there a legal duty," by answering: "not unless there is a legal duty." The latter strategy leads to a reliance on "more fundamental" legal duties as in privity, which piggy-backs on "pre-existing" contract duties, though there is no explanation of why tort rules should depend on contract, rather than contract rules depending on what might happen in some possible tort suit. This fixation, the need to discover external sources from which the theorist can abstract an answer, is carried on even when the classicists could rely on contextualized sources for their legitimacy. For example, the use of community practice and expectations, as in the confused rules about "custom" and industry practice, incorporated a lot of rich factual detail into the abstract structure, but did so through the respectably legalistic method of an inquiry as to whether a "general duty of care had been breached."

If we look over all of this, it is clear that the classical structure cannot do what it says it does. On the most theoretical level, there is not, and could not be, any explanation of when and why one external source of convincing abstraction (knee jerk morals) is preferred to another external source ("higher" legal duties or laissez-faire social theory). On a more concrete level, there are obvious conflicts in the application of each of the abstractions. Even if we

32. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

say that there is "no duty to act," we have no master theory that will tell us whether to characterize a particular situation as a "negligent omission" or a "legally blameless failure to act."

But the point that I am trying to make has less to do with the conceptual incoherence of classical legal thought and more to do with the way that—as illustrated by privity, contributory negligence, and no duty to act—it depended on a highly abstract, legalistic, rights oriented vision of the world. Because this vision becomes connected in our minds with the actual domination and inhumanity that it was used to justify, there is a tendency to assume that we can get rid of the domination by getting rid of the method of legal analysis. This assumption is part of the second standard story of first year law courses—Pollyanna historicism. It is also wrong, and in its wrongness it presents students with two contradictory ideologies—visions of law and the social world. These ideologies appear to be the only available tools for understanding what is going on in law school. But they contradict each other and they are also internally contradictory. Instead of an explanation of what is going on in their law courses, students get a massive dose of cognitive dissonance that could make a life project of alienated professional resignation and skepticism seem like the only alternative to their feelings of groundlessness.

The first ideology is the rights oriented, abstract, legalistic vision of the world that we have just been talking about. The second is the more contextualized, "policy oriented," balancing test/cost-benefit vision that is represented by all of the modern doctrines in our table of tort progressions. Look at each of our examples. The original doctrines of privity, no duty to act, and contributory negligence all depended on a notion of rights and duties being in or out, "vacuum bounded." You are either contributorily negligent or you are not; there is either a contractual duty or there is not. But it is more than just saying that the old law was rigid and we now have flexible, good law. If one looks at the criteria on which classical legal thought bases the decision to include or exclude, to create a duty of care or not, one finds that those criteria are of a different order than those used by more modern, realist influenced law.

Privity provides perhaps the clearest example. Take *MacPherson v. Buick*³³ as the context. The dealer and the eventual buyer of the car are in privity, but the buyer and the manufacturer are not. There is no duty of care between them, or so says the classical theory. The

33. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), reprinted in R. EPSTEIN, *supra* note 8, at 417-24.

revolutionary twist to the story comes when we ask the question: "what factors are important in the decision of whether or not to have a duty of care?" As soon as this question is asked, it becomes obvious that we can imagine a lot of things that are considerably more important than whether or not there is a contract between the parties. For example, who would be in the position to prevent the harm from occurring? On whom was the victim relying? Who would be the cheapest cost avoider? The classical vision rejects any of these inquiries into *facts* and instead bases its decision on a *legal* question: "was there a contractual relationship?" There is a direct parallel here with one of the examples that I gave at the beginning of the Article—formalist and purposive interpretation of the tort of false imprisonment. The person who said "a road is not a prison" is doing something similar to the classical theorist, while the person who claims to be looking to the *purpose* of the tort (protecting freedom of locomotion) is asking the same kinds of questions that a realist asks about privity.

The same pattern occurs in the other two torts that we have been examining. The classical vision depends on spheres of protected rights. The person who has been contributorily negligent gives up the right to redress for the invasion of her sphere. The person who is in need of aid can have no legal call on the assistance of the casual bystander. The two spheres of rights and duties simply do not connect. I mean to conjure up the spatial analogy. Both victim and bystander are surrounded by a shell of legal entitlements; but the shell cannot include an entitlement to call on each other when in need, because to imagine such an entitlement would be to negate one of the fundamental premises of the classical vision—that we confront each other in a state of atomistic semiparanoia. In this vision we might be able to form a connection between our two shells if we are directly engaged in a contractual relationship—contract, after all, is literally the set of legal metaphors used to describe how such atomistic actors could possibly establish legitimate claims on each other. To imagine establishing such a claim, not on the basis of legal formality, but instead on the basis of informal, but legitimate, social expectations ("foreseeability," "reliance") is to do more than to change a particular legal doctrine. To imagine a world in which the absolute privileges and immunities of contributory negligence are changed into the partial entitlements of comparative negligence is to do more than law reform. These changes actually create a new picture of the social world and its inhabitants, a picture which is in dramatic conflict with the old one.

The next thing that the student discovers is that it is not simply

that these two visions conflict in the abstract. In the first year private law courses, it is clear that the realist policy perspective is the one that is "smart, progressive, and generally the right stuff." I tried to explain this perspective in the set of doctrinal diagrams that I gave earlier. But when one gets to public law courses in the second semester or the second year, the picture is turned on its head. In constitutional law, evidence, and criminal procedure, one learns that "a formal and rigid adherence to the protections offered by the Constitution is the only way that the individual can be protected from the evils of rampant government power." Rather than being presented as a tool for the protection of established interests, formalism is put forward as the shield against totalitarianism. People who had ridiculed attempts to work out the precise zone of risk in a torts problem suddenly seem to approve of an argument that the "zone of privacy" is exactly contiguous to the molecular limits of an outside wall.

In this torts course there is no need to confront the full cognitive dissonance that these two visions will produce in liberal students. Or is there? In the next day's class we end up talking about what the economic concept of negligence could mean to an automobile company that had produced a dangerous car, that was in a fairly good position to predict statistically how many deaths and frightful injuries it would cause, and that was able to estimate, in a fairly reliable way, how much these deaths and injuries would "cost"—in terms of damages judgements, consumer loyalty, and so on. Suppose such a company goes through all of these calculations and finds that it will cost less to leave the defect as it is and pay the resulting damages, than it would to change the design of the car and thus remedy the defect. Under the logic of the Hand formula, it seems that this later position is the most economically rational action for the company to take. Yet, as evidenced by the cries of disgust with which the class met such a suggestion, this is a time when people feel that the kind of absolutist rights thinking (more reminiscent of classical legal thought) is to be preferred to relentless economic logic.

It is hard to understate the radical break that economic analysis represents. If one follows out the logic of an economic approach to tort law, then I never really have any *rights*, at least in the way that we have been accustomed to thinking about them. All that I have instead is an entitlement to have some court go through a cost-benefit calculation to determine whether the activity that I am engaging in is economically worthy of protection. If such a decision is to be overlaid with the patina of scientific authority of which practitioners of law and economics seem to be so fond, then there can never be

the complete certainty promised, even if not delivered, by the classical legal structure. I can never know that the activity I have been engaging in for twenty years is not just about to become economically "inefficient" and thus will no longer be legally protected. It may be "right" or "wrong" for the same car company to engage in exactly the same activity depending on what socio-economic group its customers come from. A chemical plant that could not be operated "nonnegligently" in the United States might meet the standard of "due care" in Bhopal—simply because the potential victims have a dramatically lower putative income.

Somehow, all of this doesn't fit very well with the idea that we are moving away from a deeply conservative formalism toward a humanistic, flexible, utilitarian approach—even if you didn't add into the equation the fact that the "individual rights courses" peddle an almost opposite message. Privity, contributory negligence, and "no duty to act" may be formalistic doctrines and they may also have operated in an oppressive way. But when one looks at all of these doctrines together and compares them to their modern counterparts, it seems less that we are moving inexorably toward Kennedy liberalism and more that we are dealing with two different utopian blueprints of the way society can and should be.³⁴ The truly remarkable achievement of law schools is to bore students even as they are putting them in the middle of this fiercely ideological conflict, fought out in hundreds of trivial little cases by people who were thus forced to leave us a record of their deepest political hopes and fears as applied to a situation of mundane complexity.

VIII. WHO IS REALLY OUT THERE?

One of the good things about teaching a night class in a school like this is that there are so many fascinating experiences to draw on, experiences that are normally hidden from view by the authoritarianism of even the "humanistic class." In the class this year, I have the usual number of legislative assistants (about six), three professors from elsewhere in the university (business, government, and political science), and the lobbyists for and against the new products liability bill. I have experts on no-fault plans and insurance rates, sociologists who have studied victim reaction to disaster, and someone who is consulting on the reform of a nearby state's

34. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). Unger's idea is that we should work with "expanded doctrine," using the ideals and images immanent in rules and their justifications as the fuel for an imaginative and frankly political legal practice.

workers' compensation scheme. I think it is fair to say that many law courses completely ignore the concrete experiences of the students in the class. I know for certain that I didn't use them well, despite my best efforts. But it is not just the students with "special knowledge" who make the job fascinating. There are also the simple recurring miracles of teaching itself.

On one particularly memorable evening I finish the class feeling, as I often do, that I had failed. In this case I had failed to convey the excitement I thought the class would find if they learned to see each case as a little piece of objectified social theory. Most of the class has left and I am standing, answering questions for those who remained, trying not to be too incoherent and thinking lovingly of a cold beer. One person keeps giving his place in line to those behind him—I assume he has something to ask me that he does not want others to hear. As I go through the seventeenth explanation of Pareto optimality³⁵ (doing great conceptual violence to it in the process), I try to guess what the question might be. Trouble with a landlord? Something really basic that he didn't understand? As always, I am hopelessly wrong. The last person straggles out leaving the questioner and I alone. I try to look simultaneously competent and sympathetic which probably makes me resemble a dyspeptic priest.

"I just had a question," he says. "You mentioned Marx in the first lecture." I nod, intrigued. "Well, this may be off the wall . . . but do you think that the judges might be creating a formal kind of . . . umm . . . hegemony . . ." (glancing at me anxiously to see if I would laugh at the word) ". . . a formal kind of hegemony that isn't so much a result of the dialectic. . ." (another anxious glance) "between economic change and ideology, but more a . . . a kind of . . . poem?" He stops and looks anxious again. "How do you mean?" I ask, losing grammar in my eagerness to see where this thought led. "Well it just seemed as though they weren't . . . you know . . . 'helping the industrialists' so much as they were making this . . . poem, you know, like with spondees and dactyls and 'sprung rhythm' and rules about construction . . . and that kind of stuff." "I think that's exactly right" I say, trying desperately not to sound pompous and failing totally. "In fact I think the only difference is that—you know how stuff like sprung rhythm was supposed to jar the reader 'out of the poem'?" He nods doubtfully. "Well the poem the judges were making was supposed to lull everyone into a feeling that things were natural the way they were—you could say

35. See R. EPSTEIN, *supra* note 8, at 113-14.

that something was seen as 'good law' to the extent that it seemed like a statement of self-evident truths and not a poetic construction at all. The height of the art form was in hiding the fact that it was an art form—even from the judges!" Amazingly, he smiles, thanks me for "clearing up that problem" and saunters out. I am left not knowing if I have just made a complete fool of myself, but I leave the classroom smiling as well.

* * *

CONCLUSION

This has been a rather frightening endeavor, the Article even more than the class. I have had to ignore so many of the things that I did during the course that it seems ridiculous to present you with the remainder. In the end I chose to concentrate on those ideas, methods, and experiences that seemed more likely to be ignored or avoided by more traditional scholarship and teaching. For example, we may mock the formalist legal theorists for their belief that language was an epistemologically pure medium capable of neutrally transmitting any message. Yet contemporary law teachers behave as though the classroom was a *socially* "pure" medium for the transmission of decontextualized truths. It is not immediately clear, to me at least, why this is any more sensible than the practices of the formalists. It was this feeling that led me to concentrate on "the hidden reality of the classroom." Even so, I have had to leave out much of the feel of the class—for example, I think it is important for teachers (and especially male teachers) to recognize the latent and complicit sexuality of all classroom power relationships. Yet I could find no way to raise that issue which was not ineradicably flawed by the objectification inherent in any narrative about the complex lives and motivations of other people.

There are other ways in which this essay presents a skewed vision of the class. In picking three or four main topics to discuss, I have skipped over my attempts to make the classroom more practical as well as more theoretical. Lack of coverage does not indicate lack of importance. Teachers have a strong obligation to help correct the tendency for contemporary law schools to graduate students who have so little practical experience that it is very hard for them to do anything other than to go to a corporate firm and write research memos. Other topics proved very difficult to cover. Despite my efforts, the students I describe remain elusively anonymous. It was simply impossible to write of friendships that were formed during the semester without risking mutual affection. Friends should not

be used as “examples.” Finally, of course, I did not include enough of my myriad failures. Apart from the obvious explanation for this fact, I have a stock of nifty rationalizations, but honesty compels silence.

If I am not going to apologize for all the defects in the Article, I could at least summarize everything I have said. Yet one of the reasons I spent so long telling stories about the classroom was that I wanted “the reader” to be able to make her own judgment about the worth and even the meaning of what I was doing. So there is more than a little paradox in the idea of a conclusion that (w)raps it all up. (Not that this will stop me for a moment, of course.) Here goes.

A lot, perhaps most, of what you do in the first year consists in learning powerful ways of arguing—ways of persuading people to do what you want, or ways of justifying the existing state of affairs, or both. Much of this Article is taken up with claims that these “languages of power” are communicated in a way that is mystifying, misleading, or wrong. The rest of the Article deals with my own attempts to communicate them effectively, without claiming that they are internally coherent, or that they justify the way the world is. I talked about the flip-flop progression between rules and mush, about purposive and formalist interpretation, and about the rest of the standard, reified arguments concerning morality, deterrence, economics, institutional competence, and formal realizability.

This kind of analytic typology of arguments is easy to grasp and it conveys something about the indeterminacy of the whole edifice, but it has few other virtues. It doesn’t tell you what kinds of arguments people actually favored at particular times, in particular places. It contains no hint of the classroom ambience that allows the professor to buttress her authority by alternately privileging first one, then the other side of each argument. And it tells you nothing about the way that the arguments might be connected to any wider ideological and political vision, or even to a technical rule structure. In a sense, the rest of the Article can be explained as an attempt to remedy these deficiencies.

The section on standard stories of a tort course tries to describe both the atmosphere of the classroom and the use of abstractions like “Progress” to convey the message that, underneath the surface irrationality, there is a deep logic to what is going on. The section on the idea of public and private “spheres” had a more ambitious set of tasks to accomplish. I wanted to show the way that we attribute a natural quality to contingent social forms (such as the pub-

lic/private distinction) and then come to experience our everyday life through the lens provided by those forms, thus reinforcing the original perception of naturalness. Then when we come to make legal arguments, we make a metaphorical leap from our everyday experiences (I want to keep my private life to myself) to their legal counterparts (the rules of private law are profoundly different from government regulation, because they are a neutral framework for independent private action). This metaphorical leap makes the legal arguments seem intuitively convincing, despite the fact that the leap is dubious and the spheres are demonstrably manipulable. The question of what we might do with this knowledge, apart from avoiding "false necessity", was taken up (at least by implication) in the final section.

The last major section was about the comparison of various "classical" doctrines—privity, no duty to act, and contributory negligence. In the classes that focused on these comparisons, I was trying to show that law really is objectified social theory, a picture of the way the world is and the way that it should be. One of the many defects of a "black letter" focus to legal education is that it makes legal history appear to be a set of isolated prescriptive changes, disguising the fact that it is also a series of radical *re-descriptions*, perhaps even re-inventions, of the world. By comparing these archetypal classical rules, I wanted to show the advantages of pulling this descriptive/prescriptive social theory out of the doctrine. However much we dislike the rule that there is "no duty to act," or the idea of contributory negligence, it would be idle to deny that they contain an appealing vision of "the good life"—free, independent individuals making their own history with will and consciousness. But they also contain a distinctly unappealing vision of the possibility of communal altruism and solidarity. Similarly, the "modern" doctrine of comparative negligence tells us that it is possible to build a system of social justice that takes account of particulars, but it also offers a picture of the world in which there are no absolute rights, merely a procedural entitlement to have a court go through a contextual cost-benefit calculation.

Looking at the doctrines this way allows us to understand the convincingness of legal arguments—each argument conjures up a believable picture of "the good life." This knowledge is not simply of tactical use; it goes beyond a merely technical aim of unleashing lawyers' creativity. By revealing the conflicting utopias captured within each case, it allows us to connect our own political beliefs to our own legal practice in a way that is more than mere instrumentalism. If, even in the most mundane tort case, the lawyer is actually acting

as a polemical social theorist, does she not have the possibility of connecting theory to practice in a way that is not only effective but actually *good*?

One last thought. If we look at all of the formal and informal languages of power that appear in these pages, it is hard to deny that they all function, at least in part, as apologies. The apologetic aspect transcends boundaries—it appears in the cynical school gossip as well as in the kind of state theory that is generally inscribed on the marble frontings of Washington's public buildings. Gnostic comments about "a government of laws, not men" help to justify the power of the state, while the first year student's obsession with "getting to the rules" helps to justify uncritical black letter teaching as well as the social power of the legal profession. The similarity is no accident. Both responses are fueled by the the same language of power. This language is built around the idea that only neutral abstractions can mediate between citizen and state in the former case and between the student and her longing for competence in the latter. Each language of power acts partly as an apology and partly as a utopian promise. And the apologies overdetermine. It is not that they cannot be used to "prove" the things their proponents claim for them; it is that they can "prove" too much.

It is the overdetermination of apology when the same legal rules, arguments, and theories can be made to yield opposite results, and yet still claim the authority of being more than mere political rhetoric. It is the overdetermination of apology when the liberal and the conservative members of a law faculty can use the same intellectual constructs to "rationalize" their political commitments, or the lack of them. It is the over determination of apology when the whole subculture of law school manages to convey the subtle but definite message that all successes come from going with the flow of the system and all failures come from your own weakness. And the really funny twist to all of this is that *it is the overdetermination of apology that you are supposed to be learning how to manipulate*. Your highest professional skill consists in using the same phenomena that have doomed the attempts of members of your own profession to justify what they were doing. And if anyone points out this tragic and wonderful paradox, they run the risk of being told to get out of the academy because they are "nihilists."³⁶

There is another way, of course. The realization that all the apologies overdetermine can be a liberating, as well as a demobilizing

36. See "Of Law and River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985); Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

phenomenon. I do not simply mean that the awful mushiness of everything lets us imagine different ways of life. We already have a lot of "stuff" to work with. The materials we work with every day contain hundreds of conflicting political theories that are "good to think," while the classroom presents a relatively risk-free environment to develop ways of turning power on itself. Isn't it just a little exciting to realize that the opinion in *Ives* is a tool for thinking about an alienated life of "professional" resignation, as well as an "old-bad-rule?"

* * *

The course is over. The reviews are in (they liked it). I'm sitting in front of a small glowing screen trying to finish an already over finished account. And, in my refrigerator a jar of delicious cranberry preserves, given to me by a member of the class, is gently decomposing. "You have Lapsed into Writing. Stop."³⁷

37. J. BARTH, LETTERS 100 (1979).

APPENDIX

FIRST YEAR MYSTIFICATION AND LEGAL ARGUMENT: HOW
TO AVOID THE FORMER AND MASTER THE LATTER

This handout¹ describes one kind of mystification produced by first year law school and explains its moral and political consequences. It claims that part of this mystification stems from the fact that you don't know what you are supposed to be learning. The rest of the handout is an extended description, with examples of the kinds of arguments that lawyers and judges make and the way that one needs to think in order to produce them. The idea is that "thinking like a lawyer" consists partly of understanding a set of easily mastered pro/con arguments about precedent and policy. You do not need to pick these arguments up by osmosis—you can learn them in thirty minutes. Learning them is important, not just educationally, but as a matter of moral and political choice.

First year is confusing because you do not know *what you are supposed to be learning*. All those vague statements about "thinking like a lawyer" should act as a signal to you that a lot of your time is to be devoted to learning a *method* of argument, rather than learning the *content* of the supposed rules on the subject. By now you should have realized that these rules are almost infinitely malleable, anyway. If the claim I am making is correct, then the "mystical first year transformation," which second and third year students tell you about, will probably occur because, time and time again, you see people using this method of argument and eventually you pick it up by osmosis. But is that the only way to do it? My claim here is that you can *learn* this method of argument and become proficient at it quickly without confusion or mystification. In the rest of this handout I attempt to explain how you can do this, but first a warning: this set of arguments and techniques is not a substitute for a political, economic, or moral understanding of the law. My description should show you that these argumentative techniques are, *by themselves*, incapable of explaining the cases or the "rules," because for

1. This piece consists of examples of the types of legal argument described by Duncan Kennedy in *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), and in his torts materials. I have tried to explain how one produces these arguments and in doing so I also relied on the work of Lon Fuller, Ludwig Wittgenstein, and Claude Levi-Strauss. *E.g.*, Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 631, 661-69 (1958); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans. 3d ed. 1958); C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (C. Jacobson & B. Grundfest trans. 1963). Although I found these other influences important, any clarity or usefulness is entirely due to Duncan Kennedy.

For a fuller account of first year mystification, see D. KENNEDY, *Legal Education and the Reproduction of Hierarchy*, in *THE POLITICS OF LAW* 40 (D. Kairys ed. 1983).

each argument or technique there is a counterargument. Without some political choice as to which side one is going to favor, the arguments are just like pairs of cliches, e.g., many hands make light work vs. too many cooks spoil the broth; a stitch in time saves nine vs. cross your bridges when you come to them.

Like cliches they appear convincing because the judge only uses one of them at a time ("no liability without fault"); but you have to learn that there is always another, *opposite* one ("between two innocents she who causes the harm must pay"). Until you learn to do this, you will be fooled by the shell game of judicial rhetoric, which appears to deduce solutions from "legal reasoning," when in fact those decisions rest on political, moral, or economic decisions.

I am going to describe two main kinds of arguments—precedential and nonprecedential. A skillful legal argument or judicial decision weaves the two techniques together so that the joints don't show; but in order to understand these techniques, you have to take them apart. Different decision makers react differently to these arguments; some will rely heavily on "precedent," some on "policy." You have to be able to understand the way that the particular judge *believes herself* to be bound by precedent or policy, at the same time as you understand that the precedents and the policy are actually *completely manipulable*.

I. PRECEDENTIAL, RULE-BASED, AND INTERPRETIVE ARGUMENTS

There are three main techniques which you need to learn if you want to argue about rules or past decisions. The first is the technique of making both purposive and formalist arguments about the meaning of words or rules. The second is the technique of generating both broad and narrow rules from the same case. The third is the general technique of factual and legal manipulation. All three techniques can be learned and, with a little practice, applied to *almost any legal dispute*. However, in this piece, I will use mainly tort examples, because that is the area with which I am most familiar.

A. *Purposive Interpretation vs. Formalist Interpretation*

1. *Method*

Formalist: To make a formalist argument, explain the meaning of the word by taking it out of context and without considering the purpose behind the rule. Having defined the word in question in the same way that a dictionary might, apply it to the fact situation.

Purposive: To make a purposive argument, "imagine" the purpose which lies behind the rule and define the word in the light of this

purpose. Notice that most rules can be explained by many conflicting purposes, so you have considerable flexibility.

2. *Examples*

The rule says "no vehicles allowed in the park." You have to decide whether to allow in an electric golf cart and a WWII truck which is to be placed on a pedestal in the park as a war memorial.

Formalist: Neither can be allowed in. If anything is a vehicle a truck is one, and golf carts are defined as "vehicles" in a set of regulations issued by the Bureau of Motor Standards Licensing Division.

Purposive: Both should be allowed in. The purpose of the rule must be to avoid pollution, noise, and the danger of accidents. Neither of these modes of conveyance pose such risks. The classifications that the Motor Standards Bureau make for *its* purposes are completely irrelevant.²

Can you bring an action under the intentional tort of false imprisonment when two policemen illegally block off one end of a public road and prevent you from passing?

Formalist: No. One is hardly *imprisoned* simply because one cannot walk in one direction, but instead must circumvent an obstruction. A road is not a prison.

Purposive: Yes. The purpose of the tort is to deter others from illegally interfering in my legally protected interest of free locomotion. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else?³

B. *Broad Rule vs. Narrow Rule*

This is the simplest but one of the most important techniques. You have to be able to take the same case and "deduce" from it different "rules" which it "stands for."

1. *Method*

Narrow rule: Tie the rule to the facts of the particular case so that it would not be capable of deciding a case in which the facts were even marginally different.

Broad rule: Take each of the phenomena in the case and make them as "abstract" as you can. To do this requires a knowledge of

2. For the origin of this example, see H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961); Fuller, *supra* note 1, at 661-69.

3. 115 Eng. Rep. 688 (1845), *reprinted in* R. EPSTEIN, C. GREGORY, & H. KALVEN, JR., *CASES AND MATERIALS ON TORTS* 1020-22 (1984) [hereinafter cited as R. EPSTEIN].

what kind of *analogies* the legal elite finds convincing in a particular historical period and a knowledge of the way in which lawyers *classify* phenomena. The example will demonstrate what I mean.

2. Example

In a case called *Vosburg v. Putney*,⁴ one child kicked another during a class in high school. The jury held that there was no intention to harm, nevertheless Putney was held liable for a considerable sum (the kick having aggravated a previous injury to Vosburg's shin).

Broad rule: All people, including children, lunatics, people acting under duress, and other persons *not normally thought of as fully responsible for their acts*, are liable for all of the consequences that result from any set of physical movements which they engage in intentionally, regardless of what they thought the consequences would be.

Narrow rule: After a class is called to order, if a child commits an act which turns out to have harmful consequences, there is a greater degree of presumption that the act was done intentionally and is unlawful.

Notice that the broad rule uses "children" as *analogous* to other classes of people—the insane, those acting under duress, etc. To be able to make this kind of argument, you need to remember all the ways in which lawyers *generalize*; in this case the common feature is "diminished responsibility." Remember that, particularly when making analogies *across* areas (e.g. torts to contract), you need to understand the current "legal consciousness" about what kinds of analogies are convincing. Remember there is no "inner logic" to these analogies; they rest on a political choice about what similarities we will recognize.

C. General Manipulation of Precedent

1. Method

Lawyers normally combine the methods I have already described with a factual and legal recategorization of what has happened in the case at hand, so as to make other cases seem more or less relevant.

2. Example

There has to be an *act* by the defendant for there to be an intentional tort. For example, in *Hurley v. Eddingfield*⁵ a doctor refused to treat a patient who was seriously ill and who had offered to pay for

4. 80 Wis. 523, 50 N.W. 403 (1891), reprinted in R. EPSTEIN, *supra* note 3, at 4-6.

5. 156 Ind. 416, 59 N.E. 1058 (1901).

the doctor's services. The person subsequently died as a result of the illness. The court held that the doctor was not liable because there was no "unlawful act," merely a refusal to contract. Taking this case and *Vosburg v. Putney* as your precedent, make precedential arguments about the following situation. A small boy starts to move a chair under an old woman who, apparently relying on the chair, began the lengthy process of seating herself. The child fails to get the chair under her in time and the woman breaks her hip.⁶

Hurley controls, Vosburg is irrelevant: Even if the woman relied on the little boy getting the chair under her, his failure to do so cannot make him liable. The sick person in *Hurley* relied on the doctor. The doctor's failure to act directly caused the patient's death. Nevertheless, as here, there was no act and thus there can be no liability.

Vosburg controls, Hurley is irrelevant: By grabbing the chair and seeming to move it under the woman, the child committed an act that started off a train of consequences which culminated in the woman's broken hip. At the time he may not have realized what the consequences of his action could be—just as Putney did not intend to hurt Vosburg and could not have known that his kick would aggravate the previous injury—nevertheless he is liable. Notice that the argument revolves around two things: the characterization of moving the chair as "an act" or as "an omission," and the way that the circumstances are "made" to resemble each other, *i.e.* "a reliance and failure to act," or "an act and an unforeseen consequence."

II. NONPRECEDENTIAL ARGUMENTS

Nonprecedential arguments, or "policy arguments," appear to be more "political" than precedential arguments. As you saw in the last section, there *are* political choices involved in the precedential arguments: in the selection of a purpose behind a rule, in the choice to rely on the supposed "plain meaning" of a word, and in the choice of one analogy or precedential argument over another. But these choices are concealed by the quick shuffle of semantics as the judge moves the categories. With "policy" arguments, however, one would expect the political choice to be on the surface. But, if your experience is anything like mine was, you have probably found these policy arguments to be both mystifying and strangely apolitical. My explanation for this phenomena is the same one that I gave earlier. The policy arguments and the pairs of cliches are merely *formal symbols*, like + or -. They alone cannot tell us what is the

6. Based on *Garratt v. Dailey*, 49 Wash. 2d 499, 304 P.2d 681 (1956).

right decision, although they *appear to* if you are only given one side of the pairs. Part of the confusion of the first year class is that the teacher generally has *both* sides of these pairs of arguments. This can make you feel dumb in comparison, but you are not; you simply have not learned all the tricks yet.

Dividing these arguments into categories is a bad idea, but there doesn't seem to be any better way to explain them. The categories are generally the ones developed by Duncan Kennedy and the idiosyncratic illustrations are mine. I propose to give a list of types of arguments, describe a method for producing them, and give brief examples. At the end of this handout, I will use them all at once, in the context of an actual case. You can use this case as an exercise to see if you are on the way to mastering these techniques.

A. Five Types of "Policy" Argument

1. Arguments about judicial administration

These arguments are sometimes called "formal realizability" arguments. One of the most common pairs goes like this:

We Need the Firm Rule

If the court adopts rule *x*, it will be laying down a firm standard which can be easily administered by judges and which will enable citizens to order their affairs in the sure knowledge of what the law is. Any other rule or standard would lead to confusion, open the floodgates of litigation, undermine the rule of law, and threaten western civilization.

vs. We Need the Flexible Standard

Rule *x* is a harsh, rigid standard which is unfair in this case and would force the courts to be unfair in many other cases. The rule cannot adapt to changing times and it will tie the court's hands in the future. Instead the court should adopt flexible standard *y* which will permit each case to be taken on its own facts, thus maintaining confidence in the court's ability to mete out equitable justice on a case-by-case basis.

2. Arguments about institutional competence

These arguments appeal to the inherent "nature" of institutions (courts, the legislature, the executive, etc.) so as to be able to claim a particular decision is or is not suitable for them to take. This gives you a lot of leeway, because it is easy to claim that institutions are good at a wide range of different and even conflicting tasks (just as it was easy to argue for different "purposes" behind a rule). The following is a good example:

Courts are the Competent Institutions

This issue is uniquely suitable for the courts to deal with. Courts are the bodies that society has set up to deal with complex factual issues, to be responsive to changing circumstances, and yet to be objective. An issue like this, which needs all of these qualities for its resolution, must be left to the courts. In addition, this issue needs to be resolved by an institution, which can take outside expert advice and has a firm understanding of the changing moral consensus of our society. Courts are the only bodies which combine all of these abilities.

vs. Courts are not the Competent Institution

This issue cannot be decided by the courts. Dealing as it does with issues of change, it must be left to the legislature, a body which reflects changing public opinion, which can bring an outside experts, and which is used to dealing with complex factual issues such as this. Regulation is the job of the legislature and the administrative branch; the courts should apply, and not make the law; if they do otherwise they threaten the separation of powers. This issue, thus, cannot be seen outside the context of our entire institutional structure—a structure which should not be threatened for the sake of some “quick fix” judicial solution.

Hint: this argument depends on “reification” or “essentialism,” the making of a concept into a thing. The same procedure is used by people who make sexist arguments *e.g.* “women are unsuited ‘by their nature’ to jobs like *x*.” As with the sexist argument, one useful counterattack is to give examples which prove the opposite. For example, if women are supposed to be “weak” and courts are supposed to be incapable of administration, point out that there are woman athletes and construction workers and that courts commonly administer schools, prisons, and mental health systems. Standard liberal constitutional thought and the theories about “judicial review” are supposed to make sense of institutional competence, but they don’t.

3. *Moral arguments*

These are harder to systematize or explain because they depend on the contradictory ideas of morals, which we all hold and which can be evoked in a particular set of circumstances. For example, there are conflicting strains in the vague background ideas of morals, on which we rely when we “intuit” a just result. The follow-

ing charts illustrate two obvious examples, form vs. substance and freedom vs. security.

Making moral decisions on the "formal" classification of the dispute (two "contracting parties") *vs.* Making moral decisions on the "substantive" relative social *power* of the "people" involved (AT&T and an inner city slum dweller).

Morality as Form

Why should a person of full age be able to get out of a valid contract that she had signed? A contract is a contract, people should keep their bargains.

vs. Morality as Substance

Why should this large corporation be able to enforce this document against a person who did not have equal bargaining power and who did not read the small print?

Making moral decisions on the basis of a right to freedom of action *vs.* Making moral decisions on the basis of a right to security.

Morality as Freedom

A doctor ought to be free to refuse any patient, otherwise the state is putting her into a form of servitude. The state should only require us to *refrain* from certain actions; it should not require us to act.

vs. Morality as Security

A seriously ill person ought to be able to be secure in the knowledge that a doctor will treat her. Otherwise people can take the benefits of society without fulfilling its concomitant obligations.

Hint: There are many other types of moral argument. The basic trick consists of *shifting the context*. If the first argument relies on *form*, you rely on *substance* and so on. Other common sets of "switchable contexts" are individual *vs.* community, content *vs.* process, individualist *vs.* altruist, single encounter *vs.* continuing series, market theory of value *vs.* labor theory of value. All of these dichotomies belong to the contradictory political world views with which we have been bombarded. For example, how about Taxation is theft *vs.* Property is theft?

4. *Deterrence or social utility arguments*

These tend to intersect with moral and economic arguments. The basic form is simple. One side argues that the proposed action will deter good conduct and encourage bad conduct, while the other side argues the opposite. But behind this apparent simplicity there are a couple of twists which you should know about.

Flexibility

The proposed standard will allow business to respond to changing conditions, to act freely and thus it will encourage competition. Any other rule would act as a straitjacket, confining business ingenuity and forcing everyone to use a rigid framework which will merely get in their way.

vs. Stability

The proposed standard will destroy certainty, upset legitimate expectations, and discourage competition because it will make people unsure that they will receive the fruits of their labor. Instead, we need a stable framework which will allow people to arrange their affairs in full knowledge of what the law is.

Hint: notice the similarity in *form* to the judicial administration/formal realizability arguments in A.1..

"Formal" Deterrence vs. Substantive Deterrence

Normally, deterrence arguments are made as though everyone knew the rules and adjusted their behavior accordingly. Consequently, one can make a fairly powerful argument by pointing out that this is not actually true; it is merely a formal assumption. This is most useful when you can point out that one of the parties is considerably more likely to know the rules and adjust its behaviour. For example, a large corporation that has a legal department may change its standard operating procedures for liability or insurance reasons, in the way that an individual might not have done. Hint: note that the argument depends on a switch of context from *formal* assumptions (all parties are rational atomistic monads) to the *substantive* realities of the situation.

5. Economic arguments

Although these arguments are being used more and more frequently, some people don't teach them. If the explanation below is too complicated just ignore it and go on to the practice example. The thing that lawyers like about economic arguments is that they give the appearance of scientific rigor and neutrality to the political choices which judges make. The more complicated the economic analysis becomes, the harder it is to understand how to flip the arguments. Here are some general hints.

Use the same trick as I discussed in the deterrence arguments; move from the formal assumptions of macroeconomics (perfect information, "rational" economic actors) to the reality of imperfect information and economically inexplicable decisions. For example, make the argument that Shylock should have taken the pound of

flesh because severe penalties for delinquent debtors will ensure greater liquidity in loan markets. Then make a counterargument, relying on the "market need" for economically quantifiable penalties which require no physical force.

When you are looking at a "cost-benefit" analysis, remember that the post-Coasian revolution proved that *anything* can be factored in as a cost, including psychic upset or the wishes of future generations, and that *all* distributions of entitlements can generate efficient solutions, assuming the absence of transaction costs. Once the analyst starts juggling the figures, these facts will be obscured; but the basic point remains. The analyst is not taking the existing entitlements as fixed and trying to replicate the operation of a perfectly efficient market, because *given* transaction costs, the replication of an efficient market often involves *changing* entitlements. Nor is the analyst putting all entitlements "up for grabs," factoring in social alienation, the "hidden injuries of class," and the kitchen sink. Instead, the analysis takes a middle ground which conceals its choice of *which* entitlements to change. This strategy confers the legitimacy of science onto a technique, which actually operates in exactly the same way as the (more vulnerable) post-realist judicial opinion. Both techniques use the same metaphors and the same rhetorical structure. Both abstract certain reified entities from social life, be they "interests" or "externalities," and having arbitrarily *created* these entities they pretend to neutrality by subsequently "balancing" them. But whereas the value choice in a balancing test is fairly obvious, cost-benefit analysts can smuggle in their preferences and thus give their tinkering with the existing distribution of wealth the sham rigour of scientific rationality.⁷

III. PRACTICE EXAMPLE

A banker in a small town is accused by the local barber of a campaign to ruin the barber's business. The banker was "in nowise interested in the occupation of barber" but nevertheless he started up a barbershop "with the sole pupose of injuring the barber." Failing to attract any barbers to the shop, he employed two at a salary and allowed them to occupy the shop rent free. The court is faced with the question of whether or not there is a legally protected interest in business good will or in freedom from malicious and unfair compe-

7. For a discussion of "liberal law and economics," see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). This section comes from Boyle, *supra* note 13 at 699-700 (text section).

tition.⁸ Make an argument for and against the creation of such a legally protected interest on the grounds of (i) judicial administration/formal realizability, (ii) institutional competence, (iii) morality, (iv) deterrence, (v) economics. A sample set of answers is on the next page.

The court *should not* create or recognize a legally protected interest in "business goodwill" or "freedom from unfair competition," because:

(i) *Judicial administration*: The creation or recognition of any such standard would be impossible, requiring the court to dig into a mass of vague subjective factors such as malice. The rule that all competition is good competition is simple and easy to enforce, whereas this proposed standard would be a judicial nightmare.

(ii) *Institutional competence*: The vague state of the law on this issue and the very fact that the court is being asked to *create* a legally protected interest show that this is a matter for the legislature. Courts should apply the law, not make it. To believe otherwise is to threaten the separation of powers itself. Besides, the resolution of such an issue demands an investigation of complicated economic issues which courts are ill-equipped to undertake.

(iii) *Morality*: In any event, the banker here has done nothing wrong. Even if he was motivated by malice, an evil intent cannot transform a morally neutral act (business competition) into a morally culpable one. If I think of stabbing my torts teacher while I am chopping garlic, am I committing a wrongful act?

(iv) *Deterrence*: Any such standard would deter socially beneficial activity, restrict commercial inventiveness and sap the entrepreneurial drive that has made America great. People are willing to go into business and face the hurly-burly of the marketplace, but if you add in the extra risk that they will be sued by economic losers claiming malice, then they will be deterred from this socially beneficial activity.

(v) *Economics*: Whatever the motive behind competition, it is still good. The consumers in the town benefitted by getting cheaper haircuts; and if the blind hands of the market place are guided by malice rather than lust for profit, the results are the same. By dividing competition into "good" and the "bad" types, the court would be setting itself on the slippery slope to socialism and economic ruination.

8. For the case, see *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909), reprinted in R. EPSTEIN, *supra* note 3, at 1362.

The court *should* create or recognize a legally protected interest in "business goodwill" or "freedom from unfair competition," because:

(i) *Judicial administration*: The proposed standard would allow the court to judge, in the light of the particular case, the advantages and disadvantages of supposedly malicious activity. This ability to give case-by-case justice is what distinguishes the courts of a free society and economic system from dogmatic totalitarianism. A rigid rule which blindly accepted all competition as good competition would shackle the courts and diminish respect for the rule of law.

(ii) *Institutional competence*: Courts are the only bodies which are competent to deal with an issue such as this. Courts are objective bodies, familiar with the working of the economic system and imbued with the situation sense which comes from exposure to all the peculiar fact situations thrown up by the vagaries of litigation. They are skilled in the type of "balancing of social interests" which this issue demands and they routinely handle the questions of malice and intention on which this case turns. Nothing in the doctrine of separation of powers prevents the courts from changing the law to adapt to changing circumstances.

(iii) *Morality*: One should not act maliciously intending to harm another person. Claiming that the act is moral because it is carried out through the neutral medium of the economic system is like claiming that sending a letter bomb is moral because it is carried through the ethically neutral framework of the postal system.

(iv) *Deterrence*: The recognition of this legally protected interest would deter socially harmful acts of malice. By reaffirming that the normal rules of morality and fairness apply to economic life, it would stop people from wasting their energies being nasty to others through the medium of the market.

(v) *Economics*: This standard will prevent economically inefficient activity at below cost. One cannot use microeconomic theory to justify an act based on malice since microeconomic theory assumes that everyone is acting rationally. In fact, economic science demands that we exclude from the market place all motives other than the desire for profit.

SUMMARY

There are three main types of precedential arguments: formalist and purposive interpretation, generating broad and narrow holdings for cases, and manipulating legal and factual categories so as to make a case seem in point. There are five main types of non-

precedential arguments: arguments about judicial administration, institutional competence, morality, deterrence, and economics. Neither the precedential nor the "policy" arguments are capable of providing a neutral, "correct" answer. You must learn to use these arguments, if you wish to convince decision makers. You cannot rely on them, or the system they justify, to provide you with moral or political guidance. In fact, the most dangerous thing about these arguments is that they tend to discourage committed moral or political thought about the legal system by making you feel insecure or powerless (until you learn them) and at the same time by offering tools to knock down any suggestion for change. But this cuts both ways. Remember that it also means that the arguments which people give you about why the status quo is "simultaneously natural, inevitable and just"—that these arguments are also vulnerable to deconstruction. The choice is yours.

